APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRUCE HOLTE HAGEN, Petitioner - Appellant/ Cross-Appellee, v. JAMES MACDONALD; MIKE MCGRATH, Respondents - Appellees/Cross-Appellants	Nos. 04-35906, 04-36051 D.C. No. CV-02-00147-LBE **MEMORANDUM*** **FILED** **JUL 12 2007** **CATHY A. CATTERSON, CLERK** **U.S. COURT OF APPEALS**

Appeal from the United States District Court
for the District of Montana
Leif B. Erickson, Magistrate Judge, Presiding

Argued and Submitted June 4, 2007
Seattle, Washington

Before: PREGERSON, FERGUSON, and IKUTA, Circuit Judges.

* This deposition is not appropriate for publication and is not precedent as provided by 9th Cir. R. 36-3.

We are presented with cross appeals from the district court's partial grant and partial denial of habeas relief to Bruce Holte Hagen. We uphold the partial denial and reverse the partial grant. We uphold the partial denial and reverse the partial grant. We review Hagen's petition under the provisions of Antiterrorism and Effective Death Penalty Act ("AEDPA"). Under AEDPA, a federal court may grant a petition for writ of habeas corpus with respect to a claim adjudicated on the merits in state court only if the state court's ruling "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). We look to "the last reasoned decision of the state court as the basis of the state court's judgment." Franklin v. Johnson, 290 F.3d 1223, 1233 n.3 (9th Cir. 2002).

I.

A.

Hagen's contention that he is entitled to habeas relief is based on an ineffective assistance of counsel claim under Strickland v. Washington, 466 U.S. 668 (1984). Under Strickland,

> [a] convicted defendant's claim that counsel's assistance was so defective as to require reversal of

> a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id, at 687. Prejudice is shown when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

Hagen first argues that he is entitled to habeas relief because the state court's ruling that trial counsel's defects caused "some prejudice," but did not deprive him of effective assistance of counsel, "was contrary to, or involved an unreasonable application of" the Supreme Court's decision in Strickland. In brief, the state trial court held that Hagen "may have suffered some prejudice as a result of his counsel's deficiencies" (emphasis added) and thus "pursuant to the authority of § 46-21-201(6) [of the Montana Code Annotated]" it amended Hagen's aggravated assault sentence to run concurrently with his deliberate homicide sentence. At the same time, the state trial court held that Hagen's counsel provided reasonably effective assistance and Hagen "failed to show in these postconviction

proceedings that there [wa]s a reasonable probability that but for the deficiencies complained of on the part of [his] trial and appellate counsel the results would have been different." The Montana Supreme Court rejected Hagen's argument that the trial court's ruling was internally inconsistent, and thus contrary to or an unreasonable application of Strickland. See Montana v. Hagen, 53 P.3d 885, 891 (Mont. 2002) (hereinafter Hagen III) ("A finding that an attorney could have done a 'better' or 'more thorough' job and that a defendant may have suffered some prejudice as a result is not the equivalent of ineffective assistance of counsel pursuant to Strickland."). [1]

We agree with the Montana Supreme Court's analysis. The state trial court's decision to amend Hagen's sentence under state law due to Hagen's trial counsel's minor deficiencies is not inconsistent with its determination that Hagen did not suffer ineffective assistance of counsel for purposes of Strickland. Accordingly, the Montana Supreme Court's rejection of Hagen's argument on this issue was not contrary to or an unreasonable application of Strickland. The district court erred in granting Hagen relief on the ground that it "was unreasonable for the trial court to find that there was enough prejudice to change the sentence on the aggravated assault conviction but not the verdict." [1]

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1 As we now reserve the grant of relief on this ground, there is no need to address the state's further arguments, including its procedural attack

B.

Second, Hagen contends he is entitled to habeas relief based on trial counsel's mishandling of the evidence related to Jim Enger's reputation for violence. The state trial court stated that "[Hagen] testified at the [evidentiary] hearing that because he did not know who was attacking, his trial counsel advised that Enger's reputation could not be introduced." Hagen claims that under Montana law, trial counsel could have introduced evidence regarding Enger's reputation for violence, and trial counsel's failure to do so deprived Hagen of a fair trial.

The Montana Supreme Court implicitly determined that Hagen's testimony, standing alone, did not establish that trial counsel failed to introduce reputation evidence solely because of trial counsel's misunderstanding of the law. The Montana Supreme Court noted that the trial counsel had not testified at the evidentiary hearing on this ineffectiveness claim, and the court could not "determine from the record whether Hagen's trial counsel investigated Hagen's assertions, and, if he did, what tactical reasons were considered for not introducing that information at trial." Hagen III, 53 P.3d at 892. Concluding that Hagen had not carried his burden to demonstrate the ineffectiveness of his counsel, the Montana Supreme Court stated that "[a] silent record cannot rebut the 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" Id. (quoting State v. Langford, 813 P.2d 936, 946 (Mont. 1991) (applying Strickland to an ineffective

assistance of counsel claim).

The Montana Supreme Court's determination that Hagen had not carried his burden of demonstrating that his counsel was deficient was not contrary to or an unreasonable application of Strickland. The district court's grant of habeas relief on the ground that the Montana Supreme Court's determination "was an unreasonable application of the law to the facts" is an error. Even if the district court would have given greater weight to Hagen's testimony, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." Williams v. Taylor, 529 U.S. 362, 411, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Further, even if Hagen had demonstrated that trial counsel's decision not to introduce reputation evidence was a deficiency for purposes of Strickland, Hagen did not show prejudice from this error, i.e., he did not show that there was a reasonable probability that the outcome of the trial would have been different had trial counsel introduced evidence of Enger's reputation for violence. Accordingly, Hagen is not entitled to habeas relief on this ground, and the district court erred in concluding otherwise.

C.

Third, Hagen claims that he was deprived of effective assistance of counsel because his lawyer failed to call a witness who was prepared to testify that Reece Cobeen gave conflicting stories about his distance from

the Hagen residence at the time of the shooting. The Montana Supreme Court assumed without deciding that trial counsel's failure to call the witness "resulted in deficient representation," but held there was no prejudice. The state supreme court held that even had the witness testified and completely discredited Cobeen - effectively removing his testimony from trial - there was not a reasonable probability that the outcome would have been different.

The Montana Supreme Court's conclusion that there was no prejudice was not an unreasonable application of Strickland. As stated above, Hagen admitted shooting Enger and his wife but claimed he thought they were strangers attacking him in his home. Cobeen undermined Hagen's stranger-self-defense theory by testifying that Hagen verbally identified and threatened Enger before shooting him. But even absent Cobeen's testimony, other evidence would have filled the gap because Enger similarly testified.

In concluding that it could grant the writ based on this ineffective assistance of counsel claim, the district court made a number of errors, including re-weighing the evidence relating to prejudice and granting relief under 28 U.S.C § 2254(d)(2) (which is limited to those circumstances in which a state court's factual findings are objectively unreasonable, See Taylor v. Maddox, 366 F.3d 992, 999 (9th Cir. 2004)). As noted above, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly."

Williams v. Taylor, 529 U.S. 362, 411, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Rather, a federal court must be "highly deferential" in determining whether a state court's decision involved an unreasonable application of Supreme Court precedent. Lindh v. Murphy, 521 U.S. 320, 333 n. 7, 117 S.Ct. 2059 138 L.Ed.2d 481 (1997), and state court decisions must "be given the benefit of the doubt." Woodford v. Visciotti, 537 U.S. 19, 24, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) (per curiam).

D.

Fourth, Hagen asserts that his appellate counsel was ineffective for failing to raise on direct
appeal his trial counsel's failure to object to the prosecutor's alleged improper reference to Mrs. Hagen's exercise of Montana's spousal privilege, see MONT. CODE. ANN. § 26-1-802. According to Hagen, "the prosecution clearly questioned Gabby Hagen about why she would not offer a statement about her husband, in contravention of Rule 505 [of the Montana Rules of Evidence]," Hagen III, 53 P.3d at 894-95. The Montana Supreme Court disagreed. It first determined that the prosecutor's conduct did not violate Rule 505 as a matter of state law. Id. at 895 (citing State v. Dawson, 761 P.2d 352, 359 (Mont. 1988)). It then held that because there was no prosecutorial misconduct, appellate counsel was not ineffective for failing to raise the issue. Id.

The Montana Supreme Court's decision that the prosecutor did not violate Montana law is not reviewable on habeas. See Lewis v. Jeffers, 497 U.S.

764, 780 (1990) ("[F]ederal habeas corpus relief does not lie for errors of state law."). Because there was no prosecutorial misconduct, appellate counsel was not deficient for failing to challenge trial counsel's failure to object to the prosecutor's comments. Therefore, the Montana Supreme Court's determination that Hagen had not established ineffective assistance of counsel based on this claim was not an unreasonable application of Strickland. The district court erred in revisiting this question.

II.

The district court did not err in denying habeas relief on the remainder of Hagen's claims.

Hagen's claim that his trial counsel was ineffective for failing to request a psychiatric evaluation in a manner that would ensure its confidentiality is procedurally barred because the Montana Supreme Court offered an independent and adequate ground for refusing relief, namely that the claim should have been raise on direct appeal. See Coleman v. Thompson, 501 U.S. 722, 750 (1991). Hagen has not claimed, let alone shown, cause and prejudice or a fundamental miscarriage of justice as a result of this bar. Id.

Further, Hagen's claim that his appellate counsel was ineffective for failing to raise the issue on direct appeal was not within the district court's Certificate of Appealability ("COA") and Hagen did not request an expansion of the COA. 28 U.S.C. § 2253(c). Even were this latter claim properly before us, however, we would affirm the district court's denial because Hagen cannot show that the state court's determination

that he was not prejudiced was an unreasonable application of Supreme Court authority. Hagen claims he was prejudiced at both trial and sentencing, but his arguments relate solely to sentencing. As we recently noted, "the Supreme Court has not delineated a standard which should apply to ineffective assistance of counsel claims in noncapital sentencing cases. Therefore, . . . there is no clearly established federal law as determined by the Supreme Court in this context." Davis v. Grigas, 443 F.3d 1155, 1158 (9th Cir. 2006) (internal citation omitted).

Hagen also challenges the denial of relief on his claim that his trial counsel was ineffective for failing to request an instruction on the lesser offense of negligent homicide. The Montana Supreme Court held that counsel's failure to request the instruction was not deficient. Trial counsel's decision not to request the instruction was not deficient. Trial counsel's decision not to request the instruction was a reasonable trial tactic given that an instruction on negligence may have jeopardized Hagen's contention that he deliberately acted in self defense. See United States v. Span, 75 F.3d 1383, 1389-90 (9th Cir. 1996). This was a reasonable application of Strickland because "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland, 466 U.S. at 690.

Finally, Hagen argues that the district court erred in granting habeas relief on his aggravated assault conviction while denying it on his deliberate homicide

conviction, arguing that the claims are inextricably intertwined. As already stated above, however, the district court erred in granting relief on the aggravated assault conviction and this argument is moot.

AFFIRMED in part, **REVERSED** in part, and **REMANDED**.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRUCE HOLTE HAGEN, Petitioner - Appellant, v. JAMES MACDONALD; MIKE MCGRATH, Respondents - Appellees.	No. 04-35906 D.C. No. CV-02-00147-LBE District of Montana, Missoula **ORDER**

BRUCE HOLTE HAGEN, Petitioner - Appellee, v. JAMES MACDONALD; MIKE MCGRATH, Respondents - Appellants.	No. 04-36051 D.C. No, CV-02-00147-LBE District of Montana, Missoula **FILED** **JAN 18, 2008** **CATHY A. CATTERSON,** **CLERK** **U.S. COURT OF APPEALS**

Before: PREGERSON, FERGUSON, and IKUTA, Circuit Judges.

The panel has voted to deny Hagen's Petition for Rehearing. Judge Ferguson has recommended

denying Hagen's Petition for Rehearing En Banc, and Judges Pregerson and Ikuta have voted to deny the en banc petition.

The full court has been advised of the Petition for Rehearing En Banc and no Judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The Petition for Rehearing and the Petition for Rehearing En Banc are DENIED.

APPENDIX C

C. B. McNeil
District Judge
Lake County Courthouse
106 Fourth Avenue East
Polson, MT 59860-2171
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MONTANA TWENTIETH JUDICIAL DISTRICT COURT, SANDERS COUNTY

STATE OF MONTANA, Plaintiff, vs. BRUCE HOLTE HAGEN, Defendant.	CAUSE NO. DC-93-23 **FINDINGS OF FACT, CONCLUSIONS OF LAW and AMENDED SENTENCE**

The above cause came before the Court, March 13, 2000, for hearing upon Defendant's Petition for Postconviction Relief; Plaintiff appeared by the Sanders County Attorney, Robert L. Zimmerman; Defendant appeared personally and by his attorney, Wendy Lee Holton; witnesses were sworn and testified, exhibits were introduced, and the Court having considered the parties' proposed findings and conclusions filed May 30, 2000, Defendant's post-hearing brief filed May 31,

2000, Defendant's post-hearing response brief filed June 23, 2000, and good cause appearing therefore, makes the following:

FINDINGS OF FACT

Findings of Fact First Issue - Claim B(4)(a): Whether trial counsel rendered ineffective assistance by failing to investigate, or present testimony, regarding Jim Enger's reputation for violence.

1. That no evidence was introduced at trial of any reputation of Enger for violence.
2. That at trial Defendant testified he did not know who his alleged "attacker" was.
3. That at the postconviction hearing, Defendant testified that he told his trial counsel that Defendant knew Enger had a reputation for fighting and bullying.
4. That at the postconviction hearing, Defendant's daughter, Kendra Hagen, testified that her father, the Defendant, had told her that Enger has a reputation for violence and that she had told such to Defendant's trial counsel.
5. That Defendant testified at the postconviction hearing that because he did not know who was attacking, his trial counsel advised that Enger's reputation could not be introduced.
6. That no issue has ever been raised by Defendant of any reputation for violence on the part of the victim Alice Goodrich.

Findings of Fact Second Issue - Claim 3(4)(b): Whether failure to investigate Jim Enger's prior criminal acts potentially impacted Enger's credibility

as a witness.

7. That at the postconviction hearing, Exhibit "L" was introduced which shows that Enger has a 1986 criminal trespass conviction and a 1987 disorderly conduct conviction, and Exhibit "L" was introduced which shows that Enger has misdemeanor convictions for theft and a concealed weapon (knife).
8. That no evidence was introduced at the postconviction hearing as to what effect, if any, evidence of Enger's prior criminal record may have had upon his credibility as a witness.

Findings of Fact Third Issue - Claim B(4)(c): Whether trial counsel was ineffective in interviewing and preparing witnesses for trial.

9. That Defendant's trial counsel did not interview the State's witness Reese Cobeen prior to trial; that said counsel did cross examine Cobeen at trial and did use one of Cobeen's pre-trial statements in said cross examination.
10. That Defendant's trial counsel did not interview Marvin Gezman as a potential witness; that there was no evidence introduced at the postconviction hearing as to what his testimony may have established.
11. That Defendant's trial counsel had Defendant's ophthalmologist testify as to Defendant's corrected vision but did not testify as to Defendant's uncorrected vision (Defendant was not wearing his glasses at the time of the shooting); that no evidence was introduced at

the postconviction hearing as to Defendant's uncorrected vision.

Finding of Fact Fourth Issue - Claim B(5):

A. Whether appellate counsel was ineffective in raising an issue on direct appeal (failure to request a lesser included offense instruction) that was more properly raised in a petition for postconviction relief.

12. That the Curt instructed the jury on the offense charged, Deliberate Homicide, and on the lesser included offense of Mitigated Deliberate Homicide.

13. That the Court did not instruct on the offense of Negligent Homicide.

14. That the record is void of any evidence of any negligence on the part of Defendant; the uncontradicted evidence, including Defendant's own testimony, is that he fired three shots from his 12-gauge pump shotgun with one shot striking the victim Jim Enger, who was on one side of the room after entry from the front door, and another shot striking the victim Alice Goodrich on the other side after entry.

15. That no trial evidence and no evidence introduced at the postconviction hearing supports a negligent homicide instruction.

B. Whether appellate counsel rendered ineffective assistance to the extent that any of Defendant's ineffective assistance of trial counsel claims are now procedurally barred because they could have been raised on direct

appeal but were not.

16. That Defendant's trial counsel obtained a pre-trial order for a psychological examination of Defendant to be used in consideration of the possible use of a mental disease or defect defense and for the possible purposes of bail reduction and consideration in a possible plea bargain.
17. That the report of the examination was made available to the prosecution and to the Court and reference thereto was made in the Presentence Investigation Report.
18. That there was no evidence introduced at the postconviction hearing that making the report of the psychological evaluation available to either the county attorney or to the Court had any effect on either the prosecution of the Defendant or his sentencing.
19. That the autopsy report of the state medical examiner, Defendant's postconviction hearing Exhibit "O," was introduced at trial without objection by Defendant's trial counsel and appellate counsel did not raise the issue of such failure to object in Defendant's direct appeal.
20. That said autopsy report states that the manner of death was homicide; that Black's law dictionary defines homicide as the killing of one person by another; that Defendant admitted in his testimony at trial that he killed Alice Goodrich by shooting her with a 12-gauge pump shotgun loaded with 00 Buck shot.
21. That Gabrielle Hagen, spouse of the Defendant,

was present during the shooting and did not make a statement to law enforcement officers until several months after the shootings.

22. That the prosecutor and Defendant's own counsel made comments during the trial concerning Mrs. Hagen's silence.

23. That the record does not reflect that either Mrs. Hagen or the Defendant invoked the spousal privilege as to communications between them, and no comments were made in the record regarding any invocation of spousal privilege.

24. That Officer Kirby described interviews of Defendant to the jury and described inconsistencies in Defendant's statements to the jury but did not express any opinion as to Defendant's credibility.

25. That Defendant's trial counsel elicited testimony from Deputy Hansen that he had known the State witness Cobeen to drink but had not known Cobeen to be a criminal or violent.

26. That Deputy Hanson did not comment on Cobeen's credibility.

27. That Defendant's counsel did comment in closing argument that the defense had to prove that the motive was self defense.

28. That the jury was instructed that the State had the burden of proving every element of the offenses charged, and that the Defendant was not required to prove his innocence or present any evidence.

Based upon the foregoing Findings of Fact, the Court makes the following:

CONCLUSION OF LAW

1. That the U. S. And Montana Constitutions guarantee the right to counsel in a criminal proceeding.
2. That the U. S. And Montana Supreme Courts have interpreted the right to counsel to mean the right to effective assistance of counsel.
3. That all of Defendant's claims in his Petition for Postconviction Relief are premised on alleged denials of effective assistance of counsel.
4. That the Defendant has the burden of showing that counsels' performance was deficient and that such deficient performance prejudiced the defense.
5. That said burden applies to claims of alleged ineffective assistance of either or both Defendant's trial counsel and Defendant's appellate counsel.
6. That the Court holds that Defendant's trial counsel provided reasonably effective assistance.
7. That the Court holds that Defendant's appellate counsel provided reasonably effective assistance.
8. That Defendant's trial counsel could have done a better job of investigating and presenting testimony regarding an alleged reputation for violence and a prior criminal record on the part of Jim Enger, the victim of the aggravated

assault charge.

9. That the Defendant may have suffered some prejudice as a result of Conclusion No. 8 with respect to defendant's claim of self defense of the aggravated assault charge involving Enger.
10. That Defendant has never raised any issue of reputation for violence or criminal record on the part of Alice Goodrich, the victim of the deliberate homicide.
11. That the jury was properly instructed on the Defendant's defense of self defense and Defendant's burden of producing sufficient evidence on that issue to raise a reasonable doubt of his guilt; that the jury had ample evidence to support its guilty verdicts on both the deliberate homicide of Alice Goodrich count and the aggravated assault of James Enger count as affirmed by the Montana Supreme Court in Defendant's direct appeal.
12. That Defendant's trial counsel could have done a more thorough job of interviewing and preparing witnesses, and Defendant may have suffered some prejudice as a result thereof.
13. That Defendant did receive a fair trial and that the result and jury verdict are reliable.
14. That Defendant was provided effective assistance of appellate counsel for his first appeal of right and that the Defendant was not prejudiced by any ineffective assistance of appellate counsel.
15. That the most difficult conclusion of law for this

Court to make, pursuant to the Supreme Court Remittiture filed February 10, 1999, relates to a "Catch-22"dichotomy in its January 22, 1999 Opinion:

> Was appellate counsel's performance deficient in raising an issue on direct appeal that was more properly raised in a petition for postconviction relief?

The postconviction relief statute, §46-21-105 (2), MCA, provides that a petitioner may not raise in a postconviction proceeding a ground for relief that was raised or could reasonably have been raised on direct appeal. In Defendant's direct appeal, his appellate counsel raised the issue of failure of Defendant's trial counsel to offer an instruction on Negligent Homicide as a lesser included offense to the Deliberate Homicide charge. By affirming Defendant's conviction and sentence in its opinion on Defendant's direct appeal, the Supreme Court made said issue resjudicata. This Court is now directed to determine whether it was ineffective assistance of appellate counsel to have included said issue on direct appeal rather than reserve it to be raised in postconviction proceedings in order to be entitled to a hearing thereon as argued by Defendant's postconviction counsel. This Court concludes that it was not ineffective assistance of appellate counsel to have included on direct appeal an issue which by statute had

to have been addressed on direct appeal or be precluded from postconviction consideration by the postconviction-relief statute.

16. That it was not ineffective assistance of Defendant's trial counsel to fail to offer an instruction on Negligent Homicide as a lesser included offense to the Deliberate Homicide charge.

17. That the record is void of any evidence of negligence sufficient to support an instruction of Negligent Homicide, even if one had been offered.

18. That it was not ineffective assistance of Defendant's appellate counsel to have raised the issue on direct appeal of the failure of Defendant's trial counsel to offer a Negligent Homicide instruction as a lesser included offense to the Deliberate Homicide charge.

19. That Defendant's appellate counsel did not render ineffective assistance to the extent that any of Defendant's ineffective assistance of trial counsel claims are now procedurally barred because they could have been raised on direct appeal but were not.

20. That Defendant's trial counsel's performance may have been deficient in making Defendant's pre-trial psychological examination report available to the prosecution and to the Court, but that no prejudice resulted to the defense.

21. That in making its conclusions of law in these postconviction proceedings, the Court does not

review the entire trial proceedings; but there was overwhelming evidence put before the jury to support its verdicts of guilty of Deliberate Homicide and Aggravated Assault and confirmed by the affirmance of the Montana Supreme Court upon Defendant's direct appeal.

22. That Defendant has failed to show in this postconviction proceedings that there is a reasonable probability that but for the deficiencies complained of on the part of Defendant's trial and appellate counsel the results would have been different. This Court expressly hold that the results would not have been different.

23. That the Defendant received a fair trial and that the trial result is reliable and that the Defendant received a fair direct appeal, and that the direct appeal result is fair and just.

24. That this Court's conclusion that Defendant may have suffered some prejudice as a result of his counsel's deficiencies relate solely to the aggravated assault of James Enger and not to the deliberate homicide of Alice Goodrich.

25. That any and all such prejudice can be eliminated by the entry by this Court pursuant to the authority of §46-21-210(6), MCA, of an amended sentence which would provide that the sentence imposed in Twentieth Judicial District, Sanders County Cause No. DC-03-23, filed June 20,1994, be amended to provide that the sentence for aggravated assault run

concurrent with the sentence imposed for the deliberate homicide sentence.

26. That Defendant's Petition for Postconviction Relief should be granted in part and denied in part; by amending the Defendant's sentence to provide that the sentence for aggravated assault run concurrent with the deliberate homicide conviction, any and all prejudice to Defendant which may have arisen out of his counsel's deficiencies relating to the aggravated assault conviction will be eliminated.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Court enters the following:

AMENDED SENTENCE

It is HEREBY ORDERED, ADJUDGED AND DECREED that the sentence imposed in Sanders County Cause No. DC-93-23, filed June 20, 1994, is hereby amended to provide that the sentence imposed for Aggravated Assault shall run concurrent with the sentence imposed for Deliberate Homicide.

DATED this 29th day of June, 2000.

C.B. McNeil

C. B. McNeil

6/29/00

pc: Robert L. Zimmerman
Wendy Lee Holton

APPENDIX D

No. 00-482

IN THE SUPREME COURT OF THE STATE OF MONTANA

2002 MT 190

STATE OF MONTANA,

Plaintiff and Respondent,

v.

BRUCE HOLTE HAGEN,

Defendant and Appellate.

FILED

Aug 29 2002

Ed Smith
Clerk of Supreme Court
State of Montana

APPEAL FROM: District Court of the Twentieth Judicial District, In and for the County of Sanders, The Honorable C. B. McNeil, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Wendy Holton, Attorney at Law, Helena, Montana

For Respondent:

Hon. Mike McGrath, Attorney General; C. Mark Fowler, Assistant Attorney General, Helena, Montana

Robert Zimmerman, Sanders County Attorney, Thompson Falls, Montana

Submitted on Briefs: September 6, 2001

Decided: August 29, 2002

Clerk

Justice Terry N. Trieweiler delivered the Opinion of the Court,

¶1 The Defendant, Bruce Holte Hagen, filed a petition for postconviction relief in the DistrictCourt for the Twentieth Judicial District in Sanders County to have his 1994 conviction for deliberate homicide and aggravated assault set aside based on ineffective assistance of counsel. The District Court dismissed the petition and on appeal, this Court affirmed impart, reversed impart, and remanded for an evidentiary hearing to consider those allegations not based on facts in the record. Following that hearing, the District Court issued its Findings of Fact, Conclusions of Law, and Amended Sentence, in which it granted in part and denied in part Hagen's petition for postconviction relief by affirming his conviction but amending his sentence. Hagen appeals the District Court's judgment. We affirm the District Court.

¶2 The following issues are presented on appeal:

¶3 1. Did the District Court err when it failed to review the entire record prior to entering its Findings of Fact, Conclusions of Law and Amended Sentence?

¶4 2. Did the District Court err when it concluded that Hagen's trial counsel provided reasonably effective assistance?

¶5 3. Did the District Court err when it concluded that Hagen's appellate counsel provided reasonably effective assistance?

FACTUAL AND PROCEDURAL BACKGROUND

¶6 On May 12, 1994, Bruce Holte Hagen was convicted by a jury in the Twentieth Judicial Court in Sanders County of deliberate homicide in violation of § 45-5-102, MCA, and aggravated assault in violation of § 45-5-202, MCA. The charges arose from an incident at Hagen's home in which Alice Goodrich was shot and killed and James Enger was wounded. The District Court sentenced Hagen to life in prison for the deliberate homicide conviction and twenty years for the aggravated assault convict, with ten years added to each sentence for use of a dangerous weapon. The District Court ordered that the sentences be served consecutively. Hagen's appointed trial counsel, Matt Pavelich, filed a motion for a new trial based on his failure to call a witness. The District Court denied Hagen's motion for a new trial. Hagen appealed the District Court's judgment. Stephen Nardi was appointed to represent him on appeal.

¶7 In *State v. Hagen* (1995), 273 Mont. 432, 434, 903 P.2d 1381, 1382 ("*Hagen I*"), Hagen raised two issues for review: (1) whether the District Court erred when it refused to give Hagen's proposed jury instruction on the justifiable use of force in defense of an occupied structure; and (2) whether Hagen was denied effective

assistance of counsel. The ineffective assistance of counsel claim was predicated on four alleged failings by his trial counsel: (1) failure to object to a remark by the prosecutor during voir dire; (2) failure to request an instruction on Hagen's right to rely on appearances in support of his justifiable use of force defense; (3) failure to request an instruction on negligent homicide as a lesser offense; and (4) failure to call a witness who would have testified to prior inconsistent statements by a key State witness. We affirmed the District Court on all issues. *Hagen I*, 273 Mont. At 445, 903 P.2d at 1389. A more detailed recitation of the factual background in this case can be found in *Hagen I*.

¶8 On April 14,1997, Hagen filed a petition for postconviction relief, and alleged that both his trial counsel, Matt Pavelich, and appellate counsel, Stephen Nardi, were ineffective. The District Court dismissed all claims in the petition on June 13, 1997. Hagen appealed the dismissal, and in *Hagen v. State*, 1999 MT 8, 293 Mont. 60,973 P.2d 233 (*"Hagen II"*), this Court affirmed in part and reversed in part. We held that certain allegations of ineffective assistance of counsel were not based on facts in the record, were properly raised in the petition for postconviction relief, and, therefore, an evidentiary hearing was necessary. All other allegations of ineffective assistance of counsel which were record-based were dismissed on procedural grounds.

¶9 On March 13, 2000, the District Court Held an evidentiary hearing. On June 29, 2000, the District

Court issued its Findings of Fact, Conclusions of Law and Amended Sentence. The District Court denied Hagen a new trial, but granted him partial postconviction relief by ordering that his aggravated assault sentence run concurrently with his deliberate homicide sentence. On July 11, 2000, Hagen appealed the District Court's judgment.

STANDARD OF REVIEW

¶10 The standard of review of a district court's denial of a petition for postconviction relief is whether the trial court's findings of fact are clearly erroneous and whether its conclusions of law are correct. *State v. Hanson* (1999), 1999 MT 226, ¶ 9, 296 Mont. 82, ¶ 9, 988 P.2d 299, ¶ 9.

ISSUE 1

¶11 Did the District Court err when it failed to review the entire record prior to entering its Findings of Fact, Conclusions of Law and Amended Sentence?

¶12 In Conclusion of Law No. 21, the District Court stated: "That in making its conclusions of law in these postconviction proceedings, the Court does not review the entire trial proceedings;....." Hagen contends that the District Court had an obligation to review the trial record since his claims were record-based, and its failure to review the entire record deprived him of due process and resulted in erroneous finds and conclusion.

¶13 Due process is "not a fixed concept but, rather, is one which must be tailored to each situation in such a way that it meets the needs and protects the interests of the various parties involved." *Small v.*

McRae (1982), 200 Mont. 497, 507, 651 P.2d 982, 988. The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Connell v. State, Dept of Social Services* (1997), 280 Mont. 491, 496, 930 P.2d 88, 91. The concept of due process is a flexible one calling for such procedural protections as the particular situation demands. *Sage v. Gamble* (1996), 279 Mont. 459, 464-65, 929 P.2d 822, 825.

¶14 Postconviction relief statutes, found in Title 46, Chapter 21, MCA, do not explicitly require that a district court review the entire record. Here, the District Judge who presided over the postconviction hearing was the same judge who presided at trial. Review of the relevant portions of the court record is of importance when a judge other than the trial judge presides over the postconviction hearing. However, that was not the case here.

¶15 Furthermore, we refuse to impose on district courts a full-fledged duty to review the *entire* record in *every* situation. District courts maintain a duty to review those portions of the record which are at issue in the postconviction proceeding. For a district court which presided over the trial phase of a criminal proceeding, that duty likely does not extend to the entire record. The scope of the duty is determined on a case by case basis. Here, because the petition for postconviction relief was before the same judge who listened to the trial testimony when, it was presented, and given the extensive nature of the District Court's findings of fact and conclusions of law, we conclude

that Hagen was not deprived of due process, and that the District Court did not err when it made its decision without reviewing the entire trial record.

ISSUE 2

¶16 Did the District Court err when it concluded that Hagen's trial counsel provided reasonably effective assistance?

¶17 A petitioner seeking to reverse a district court's denial of a petition for postconviction relief based on a claim of ineffective assistance of counsel bears a heavy burden. *Dawson v. State*, 2000 MT 219 ¶ 20, 301 Mont. 135, ¶ 20, 10 P.3d 49, ¶ 20. In evaluating claims of ineffective assistance of counsel, this Court has adopted the two-part test set forth in *Strictland v. Washington* (1984), 466 U.S. 668, 104 S.Ct 2052, 80 L.Ed.2d 674. See *Hagen II*, ¶10; *Dawson*, ¶ 20. The defendant bears the burden of first showing that his counsel's performance was deficient, which entails "showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. To assess deficient performance, we apply the "reasonably effective assistance" test for whether a defendant's counsel acted within the range of competence demanded of attorneys in criminal cases. *State v. Leavens* (1986), 222 Mont. 473, 475, 723 P.2d 236, 237.

¶18 Second, the defendant must show that the deficient performance "so prejudiced the defendant as to deprive the defendant of a fair trial, a trial whose result is reliable...." *Strickland*, 466 U.S. at 694, 104

S.Ct. at 2068; *Dawson*, ¶ 20; *State v. Allen*, 2001 MT 266, ¶ 27, 307 Mont. 253, ¶ 27, 37 P.3d 655, ¶ 27.

¶19 In *Strickland*, the U.S. Supreme Court stated:

> Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.

466 U.S. at 697, 104 S.Ct. at 2069. Finally, a claim of ineffective assistance of counsel must be grounded in facts found in the record, not on "mere conclusory allegations." *State v. Hurlbert* (1988), 232 Mont. 115, 120, 756 P.2d 1110, 1113 (*citing State v. Tome* (1987), 228 Mont. 398, 403, 742 P.2d 479, 482).

¶20 Before addressing the merits of Hagen's ineffective assistance claims, it is necessary that we address Hagen's claim that the District Court's findings and conclusions regarding prejudice from

trial counsel's performance were inconsistent.

¶21 In *Hagen II*, this Court remanded to the District Court for an evidentiary hearing to consider three issues: (1) whether trial counsel was ineffective for failing to investigate James Enger's reputation for turbulence, violence and trouble-making; (2) whether trial counsel was ineffective for failing to investigate or present significant impeachment testimony regarding Enger's credibility; and (3) whether trial counsel was ineffective for failing to interview and prepare witnesses prior to trial. The evidentiary hearing was held on March 13, 2000, and Bruce Hagen, Kendra Hagen (Bruce's daughter), and Reece Cobeen, a key prosecution witness, testified. Hagen's trial counsel did not testify. The District Court issued its Findings of Fact, Conclusions of Law, and Amended Sentence, and with respect to Hagen's trial counsel, made the following conclusions of law:

> 8. That Defendant's trial counsel could have done a better job of investigating and presenting testimony regarding an alleged reputation for violence and prior criminal record on the part of Jim Enger, the victim of the aggravated assault charge.
>
> 9. That the Defendant may have suffered some prejudice as a result of Conclusion No. 8 with respect to defendant's claim of self defense of the aggravated assault charge involving Enger.

.....

12. That Defendant's trial counsel could have done a more thorough job of interviewing and preparing witnesses, and Defendant may have suffered some prejudice as a result thereof.

¶22 While the District Court concluded that Hagen's trial counsel could have done a "better" and "more thorough" job and, as a result, "may have suffered some prejudice as a result," the District Court also made the following Conclusions of Law:

6. That the Court holds that Defendant's trial counsel provided reasonably effective assistance.

.....

22. That the Defendant has failed to show in these postconviction proceedings that there is a reasonable probability that but for the deficiencies complained of on the part of Defendant's trial and appellate counsel the results would have been different. This Court expressly holds that the results would not have been different.

23. That the Defendant received a fair trial and that the trial result is reliable.

¶23 Therefore, it appears that the District Court concluded that Hagen's trial counsel's performance was in part deficient, but that the deficient performance did

not so prejudice Hagen that it deprived him of a fair trial. Hagen contends these findings and conclusions are inconsistent and that the judgment that followed must be reversed. However, it is entirely possible within the framework of *Strickland* to find attorney error which possibly prejudiced the defendant, yet conclude that such error did not rise to a level serious enough to result in a verdict unworthy of confidence. Such was the case here. The burden on the defendant under *Strickland* is a heavy one. The defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment," which also showing that counsel's deficient performance was so prejudicial that he was denied a fair trial. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. The District Court concluded that Hagen's trial counsel's errors did not rise to that level. The controlling language of the District Court's conclusions of law are those that track the dispositive elements of the *Strickland* analysis. A finding that an attorney could have done a "better" or "more thorough" job and that a defendant nay have suffered some prejudice as a result is not the equivalent of ineffective assistance of counsel pursuant to *Strickland*. Therefore, we conclude that the District Court's findings and conclusions are not substantively inconsistent and do not require reversal of the District Court's judgment.

A. Failure to Investigate Enger's Reputation

¶24 Hagen contends that his trial counsel failed to investigate or offer evidence of James Enger's reputation for violence, heavy drinking and trouble-

making. Hagen asserts that the introduction of such evidence would have impacted Enger's credibility as a witness. According to Hagen, his trial counsel's decision not to pursue an investigation of Enger was based solely on his misunderstanding of the law and mistaken belief that such evidence would be inadmissible. Based on that error, Hagen asserts that his trial counsel rendered ineffective assistance of counsel.

¶25 The State, on the other hand, argues that while Hagen may have informed his trial counsel of Enger's reputation, the record is silent as to whether Hagen's trial counsel conducted any investigation into the matter. The State also contends that any assertion that Hagen's trial counsel misunderstood the law is mere speculation, and that Hagen's trial counsel had sufficient tactical reasons to avoid introducing any evidence of Enger's reputation. The State's contentions are well taken.

¶26 Trial counsel has a duty to either conduct a reasonable investigation or make a reasonable decision that a particular investigation is unnecessary. *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066. Here, however, we cannot determine from the record whether Hagen's trial counsel investigated Hagen's assertions, and, if he did, what tactical reasons were considered for not introducing that information at trial. The burden was on Hagen to demonstrate ineffectiveness and Hagen's trial counsel did not testify at the evidentiary hearing. A silent record cannot rebut the "strong presumption that counsel's conduct falls within the

wide range of reasonable professional assistance." *State v. Langford* (1991), 248 Mont. 420, 432, 813 P.2d 936, 946 (*quoting Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065). Therefore, we conclude that ineffective assistance for failure to investigate or prove Enger's reputation has not been established.

B. Failure to Investigate Enger's Prior Criminal Acts

¶27 Hagen next contends that had his trial counsel investigated Enger's background, he would have discovered a history of disorderly conduct. Evidence was introduced at the hearing that Enger was convicted of criminal trepass in 1986 and disorderly conduct in 1987, in addition to misdemeanor convictions for theft and possession of a concealed weapon. The District Court found that no evidence had been introduced as to what effect, if any, such evidence would have had on Enger's credibility as a witness. We agree that the relevancy of Hagen's criminal background was questionable considering the remoteness of his convictions and the fact that he was invited to the Hagen property by the Defendant's wife. Most importantly, however, the record indicates that Hagen's trial counsel did conduct some sort of investigation into Enger's background. At the hearing, Hagen himself testified as follows:

Q: Did you tell Mr. Pavelich anything about Jim Enger's reputation for violence and troublemaking?

Hagen: Yes, I did.

Q: And what did you tell him?

Hagen: I told him that he had a reputation for fighting and picking on people instead of - trying to be a bully, especially when he had been drinking. *And I also heard from Matt* [Pavelich] *himself that he had a criminal record, that they were checking on him in Plains for stealing from mailboxes* [Emphasis added.]

Therefore, Hagen's trial counsel did perform some type of investigation into Enger's criminal record. Based on all the foregoing considerations, we conclude Hagen has not proven ineffective assistance of counsel for failure to investigate Enger's criminal background.

C. Enger's Civil Lawsuit

¶28 Hagen asserts that further investigation would have revealed that Enger had filed a civil lawsuit against Hagen which was pending at the time of Hagen's trial. As a result of that lawsuit, Hagen contends that Enger had a financial stake in the outcome of the trial. The State contends that the jury was aware that Enger suffered significant physical injuries from the shooting and could reasonably infer that Enger would seek monetary redress for his medical injuries.

¶29 We agree that disclosing a civil suit would have demonstrated a financial interest in the outcome of this prosecution and would have been relevant. However, the record does not disclose that counsel failed to investigate the suit or why counsel chose not to offer evidence of the suit, if he knew of it. Most critically,

however, we are unable to conclude that evidence of the suit would have produced a different result in the context of all the evidence offered at Hagen's trial. Therefore, we conclude that the District Court did not err by its resolution of this claim.

D. Failure to Interview and Present Impeaching Testimony of a Critical Prosecution Witness

¶30 Hagen asserts that his trial counsel failed to interview Reece Cobeen, a critical prosecution witness. In addition, Hagen contends that his trial counsel failed to bring to the jury's attention a pretrial statement that would have contradicted Cobeen's testimony, or offer any other evidence to impeach him. The State, on the other hand, contends that this issue was previously decided in *Hagen II.*

¶31 The issue presented to this Court in *Hagen II* was whether Hagen's trial counsel was ineffective for failing to investigate or present testimony to impeach both Cobeen and Enger. With regard to Cobeen, we stated: "We agree with the State that Bruce's ineffective assistance of counsel claim with regard to counsel's failure to investigate or present testimony impeaching Reece was raised and resolved during Bruce's direct appeal." *Hagen II*, ¶ 32 (*citing Hagen I*, 273 Mont. at 444, 903 P.2d at 1388). Therefore, we conclude that this claim is barred by principles of *res judicata.*

E. 911 Transcript

¶ 32 Hagen also contends that his trial counsel was ineffective for his failure to present evidence of Hagen's call to the 911 dispatcher immediately following the

shootings. Hagen asserts that the transcript of the phone call was the best evidence of his state of mind at the time of the incident. The 911 transcript revealed that Hagen told the dispatcher, "I was attacked in my house and I - I - I don't (?) like that. We need an ambulance and we need the police." The State contends that the best evidence of Hagen's state of mind at trial was from Hagen's own testimony.

¶ 33 The 911 transcript would have corroborated Hagen's testimony and may have been admissible as a prior consistent statement. *See* Rule 801(d)(1), M.R.Evid. However, we have previously stated that counsel has not obligation to present cumulative evidence. *State v. Allen,* 2001 MT 266, ¶ 29, 307 Mont 253 37 P.3d 655, ¶ 29. Furthermore, we are unable to speculate why the evidence was not offered. Finally, even if there was no sound tactical reason for not offering the evidence, we are unable to conclude that its presentation would have led to a different result. Therefore, we conclude that the failure to offer the transcript is not a sufficient basis on which to set aside Hagen's conviction.

¶34 We conclude that the District Court did not err when it concluded that trial counsel's performance was reasonably effective and that any omissions of counsel were not sufficient to undermine confidence in the trial's outcome.

ISSUE 3

¶35 Did the District Court err when it concluded that Hagen's appellate counsel provided reasonably effective assistance?

¶36 Hagen contends that his appellate counsel was ineffective for the following reasons: (1) he failed to raise issues regarding the manner in which Hagen's mental health evaluations were obtained, the nature of those evaluations, and the dissemination of the evaluations to the District Court and the prosecution; (2) he failed to raise trial counsel's failure to object to the introduction of an autopsy report which referred to the cause of death as a "homicide"; (3) he failed to raise trial counsel's failure to object to the State's comments on Hagen's wife's invocation of spousal privilege; (4) he failed to raise trial counsel's failure to object to improper comments about Hagen's wife's credibility; (5) he failed to raise trial counsel's improper vouching for a prosecution witness during the cross-examination of another prosecution witness; (6) he failed to raise trial counsel's shifting of the burden of proof during closing argument; and (7) he raised trial counsel's failure to request a lesser included offense instruction on direct appeal rather than on postconviction relief. We will address each allegation in turn.

¶37 Claims of ineffective assistance of appellate counsel are analyzed, like those of trial counsel, according to the standard set forth in *Strickland*. *Dawson*, ¶ 147. "The petitioner must show that counsel's advice fell below an objective standard [of] reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the petitioner would have prevailed on appeal." *Dawson*, ¶ 147.

A. The Mental Health Examination

¶38 On October 25, 1993, Hagen's trial counsel moved the District Court for an order pursuant to § 46-14-202, MCA, to require Hagen be examined by a licensed psychologist or psychiatrist to determine his fitness to proceed. Hagen was examined by William Stratford, M.D., and Herman Walters, Ph.D. Hagen alleges that prior to the examination, he was informed by his trial counsel that the District Court had ordered him to see a psychiatrist before the bond hearing. However, Hagen alleges he was not informed of his right to a confidential examination at the State's expense, or that his examination results could be used against him at sentencing. The evaluation results of both Dr. Stratford and Dr. Walters were shared with the District Court and the State. The District Court referred to the psychological reports and the presentence investigation report in the sentencing order.

¶39 Although the District Court concluded that the trial counsel's performance "may have been deficient in making Defendant's pre-trial psychological examination available to the prosecution and to the Court," it also concluded that "no prejudice resulted to the defense." The District Court also found that "there was no evidence introduced at the postconviction hearing that making the report of the psychological evaluation available . . . . had any effect on either the prosecution of the Defendant or his sentencing." Without such evidence, the District Court concluded that Hagen's appellate counsel was not ineffective for failing to raise the issue on direct appeal.

¶40 As the defendant, Hagen carries the burden of showing that but for appellate counsel's performance, the result of the proceeding would have been different. Here, however, Hagen has not identified what information in the doctors' evaluations was damaging to his defense. Furthermore, we cannot conclude, based on facts before us, that Hagen's sentence was somehow lengthened based solely on the doctors's evaluation. While Hagen's psychological evaluation results deserved better protection, we cannot determine what prejudice occurred as a result of appellate counsel's failure and, therefore, conclude that the District Court did not err by rejecting Hagen's claim made on this basis.

B. The Autopsy Report

¶41 Hagen contends that his appellate counsel should have attacked his trial counsel's failure to object to the State's introduction of an autopsy report which characterized the nature of the case as a "homicide." According to Hagen, the medical examiner's report amounted to expert testimony that the cause of death was murder, which would have directly contravened his affirmative defense of justifiable use of force. Hagen contends that permitting such information without an objection or limiting instruction was a record-based error of his trial counsel that should have been raised on appeal by his appellate counsel.

¶42 However, it was an uncontroverted fact that Hagen killed Alice Goodrich. That killing qualifies as a homicide based on the general definition of the term. As the District Court found, "Black's [L]aw [D]

ictionary defines homicide as the killing of one person by another." Following that definition, Black's Law Dictionary goes on to quote a criminal law treatise which states, "The legal term for killing a man, whether lawfully or unlawfully, is 'homicide.' There is no crime of 'homicide'" Black's Law Dictionary 739 (7th ed. 1999) (*quoting* Glanville Williams, *Textbook on Criminal Law* 2[illegible]4 (1978)). Furthermore, trial counsel explained the difference between "homicide" and the legal term "deliberate homicide" in his closing argument. We conclude that failure to object to use of the term in the report or request a limiting instruction was not ineffective and, therefore, we conclude Hagen's appellate counsel had no responsibility to raise the issue on appeal.

C. Invocation of Spousal Privilege

¶43 Next, Hagen contends that his appellate counsel should have raised on direct appeal his trial counsel's failure to object to the State's comments on Hagen's spouse's invocation of spousal privilege. Hagen asserts that the prosecution clearly questioned Gabby Hagen about why she would not offer a statement about her husband, in contravention of Rule 505, M.R.Evid. Those actions, according to Hagen were patently improper because of the inferences that could be drawn from Gabby's decision not to offer a statement.

¶44 We analyze alleged prosecutorial misconduct incases such as this to determine whether the language used was manifestly intended or of such a character that a jury would naturally and necessarily take it as a comment on the failure of the privileged individual

to testify, *See State v. Dawson* (1988), 233 Mont. 345, 356, 721 P.2d 352, 359. After review of the record in this case, we cannot conclude that the jury would "naturally and necessarily" have interpreted the comments of the prosecutor as comments on Gabby Hagen's invocation of spousal privilege. Therefore, we conclude that Hagen's appellate counsel did not err by failing to raise the issue on appeal

D. Inappropriate Opinion Testimony on Credibility

¶45 The State introduced two videotapes which recorded police interviews of Hagen. After the first tape was shown to the jury, the prosecutor asked Office Larry Kirby to describe inconsistencies he believed to exist between the two interviews, in an attempt to show that Hagen had changed his story to fabricate a defense. Hagen contends that this testimony amounted to a comment on Hagen's credibility which was inadmissible pursuant to the Montana Rules of Evidence and applicable case law. *See* Rules 701 and 702, M.R.Evid.; *State v. Webb* (1990), 243 Mont. 368, 792 P.2d 1097. ¶46 However, pointing out inconsistencies in a person's statements is not the equivalent of expressing an opinion on credibility. Furthermore, it is difficult to infer prejudice since the jury had the independent opportunity to review the same statements. Therefore, we conclude that appellate counsel was not ineffective for failing to raise this issue on appeal.

E. Improper Vouching for a Prosecution Witness

¶47 Hagen's trial counsel elicited the following

testimony of Deputy Jonathan Hansen on cross examination:

> Q: While you had encountered them in the bar and some talk about a shooting, did you feel Punky Cobeen was the kind of person who would keep them out of trouble later in the evening?
>
> A: I have never known him to be violent. I've known him to drink, but I've never known him to be a criminal or be violent.

Hagen contends that no competent, experienced defense attorney would deliberately introduce evidence of a police officer's personal opinion regarding the character of a key prosecution witness. That attorney error, Hagen contends, was prejudicial to his defense, and should have been raised on appeal. Because it was not, Hagen asserts his appellate counsel was ineffective. The State contends that Hagen's charge is meritless because Officer Hansen's statement that Cobeen was neither violent nor a criminal was not indicative of Cobeen's truthfulness. According to the State, it was not vouching testimony. The District Court found that "Deputy Hansen did not comment on Cobeen's credibility."

¶48 While this Court has warned against the introduction of improper vouching testimony, particularly by the prosecution, we conclude that the above-cited testimony does not constitute vouching testimony. As the Ninth Circuit has stated,

"introducing bolstering evidence is not the same as vouching for the witness;. . . ." *United States v. Meling* (9th Cir. 1995), 47 F.3d 1546, 1558. The testimony cited above was more an example of character-bolstering evidence, not vouching. Furthermore, there was only one instance cited and we simply cannot conclude based on that isolated instance that Hagen's trial counsel was ineffective or that Hagen was prejudiced by the remark. Accordingly, we conclude that appellate counsel was not ineffective for failing to raise this issue on appeal.

F. Closing Argument

¶49 Hagen asserts that his appellate counsel erred when he failed to raise his trial counsel's comments during closing argument which purportedly misinformed the jury that the burden of proof had shifted to the defense. During closing argument, Hagen's trial counsel stated:

> I know that the State is going to say, "Hey, you look at the elements of these crimes charged. We don't need to prove motive. We don't need to prove motive at all," and which is true. Motive is not an element of either of the crimes charged. As a matter of fact, we have to prove motive. We have to prove that the motive was self-defense. Well, so be it. If it wasn't self-defense, what was it?"

Based on the above statement, Hagen contends the jury was erroneously led to believe that the defense

had the burden of proof and, in effect, had to disprove the State's allegations. The State, on the other hand, asserts Hagen's trial counsel was correct in noting that when self-defense is raised as an affirmative defense, the defendant does not assume the burden of showing that the self-defense was justified and reasonable.

¶50 In *State v. Daniels* (1984), 210 Mont. 1, 16, 682 P.2d 173, 181, we stated the general rule with regard to burden-shifting as a result of a defendant raising an affirmative defense:

> The State has the burden of proving beyond a reasonable doubt every element of the offense charged, or any lesser-included crime within such charge; the defendant if he raises the affirmative defense [such as self-defense] has the burden of producing sufficient evidence on the issue to raise reasonable doubt of his guilt, ...

Therefore, in this case, the burden did shift to Hagen to produce sufficient evidence to raise reasonable doubt of his guilt based on his justifiable use of force defense. Hagen's trial counsel's comments were consistent with that shift of the burden. Furthermore, we presume that the jury follows the law as it is given, and in Jury Instruction No. 21, the jury was correctly instructed:

> The defendant has pleaded justification in the use of force in this case. The defendant has the burden of producing sufficient

> evidence of justification in the use of force to raise a reasonable doubt of his guilt. Your are to consider the following requirements of the law in determining whether the use of force claimed by defendant was justified:
>
> . . . . .
>
> [Lists five requirements.]
>
> . . . . .
>
> You are further advised that even if you determine the use of force by defendant was not justified, the state still has the duty to prove each of the elements of the crime charged beyond a reasonable doubt.

Based on the foregoing, we presume that the jury was correctly informed of the law, and further conclude that Hagen's trial counsel was not ineffective based on the comments he made during closing argument. Therefore, we conclude that Hagen's appellate counsel was not ineffective for raising the issue on direct appeal.

G. The Instruction on Negligent Homicide

¶51 Hagen next contends that his appellate counsel was ineffective for raising his trial counsel's failure to request a lesser included offense instruction on direct appeal rather than by postconviction relief. Appellate counsel, according to Hagen, should have recognized that an evidentiary hearing was necessary, and,

therefore, should have raised the issue by way of a postconviction proceeding. While Hagen contends that evidence in support of his claim would have been presented at a postconviction hearing, he failed to establish what that evidence would have shown. Furthermore, claims which can reasonably be raised on direct appeal "may not be raised, considered, or decided" in a postconviction relief proceeding. § 46-21-105(2), MCA. Had Hagen's appellate counsel not raised the claim, Hagen would have, in all likelihood, been procedurally barred from raising it by postconviction relief. Therefore, we conclude that he was not ineffective for raising it on appeal.

H. Cumulative Error

¶52 Finally, Hagen contends that the cumulative effect of appellate counsel's alleged errors caused him prejudice, even if any of the errors standing alone would not be sufficiently prejudicial. However, having analyzed each of Hagen's allegations separately, we have concluded that in each situation, counsel either acted reasonably or his omission did not undermine confidence in the outcome. We also conclude that the combined effect of all the acts or omissions complained of did not undermine confidence in the outcome of Hagen's trial.

¶53 For the foregoing reasons, the judgment of the District Court is affirmed.

Terry Trieweiler
Justice

We Concur:

Patricia Cotter

James C. Nelson

W. William Langhart

Jim Rice

APPENDIX E

Honorable Leif B. Erickson
Federal Magistrate Judge
Missoula Division
Russell E. Smith Courthouse
201 East Broadway, Room 370
Missoula, MT 59802

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

BRUCE HOLTE HAGEN,
Petitioner,

vs.

JAMES MACDONALD,
Warden, Crossroads
Correctional Center,
MIKE MCGRATH,
Montana Attorney
General,
Respondents.

Cause No. CV 02-147-M-LBE

FINDINGS AND
RECOMMENDATION
OF U.S. MAGISTRATE JUDGE

I. NATURE OF THE CASE

This is a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 challenging Petitioner's 1994 conviction for deliberate homicide and aggravated assault.

II. PARTIES

Petitioner is a state prisoner currently incarcerated at Crossroads Correctional Center.

The named Respondents are James MacDonald, Warden at Crossroads Correctional Center and Mike McGrath, Montana Attorney General.

III. FACTUAL BACKGROUND

The shooting incident giving rise to the charges in this case occurred in the early morning hours of October 2, 1993. The events leading up to the shooting began on the evening of October 1, 1993 when Petitioner's wife, Gabby Hagen, and a guest of the Hagens, Steve Jennette, left the Hagen residence and went into town. While in town Gabby and Steve met up with the victims, James Enger and Alice Goodrich. All four individuals had been drinking and eventually sought the assistance of Reece (Punky) Cobeen to give them a ride back to the Hagen residence.

When they arrived at the Hagen residence, Mr. Cobeen and Mr. Jennette began unloading some of Mr. Jennette's personal belongings from Mr. Cobeen's truck while Mr. Enger and Gabby Hagen began knocking and pounding on the front door. The Hagens secured their front door using a two-by-four propped against the door handle. Eventually Mrs. Hagen and her visitors were able to awaken Mr. Hagen. Mr. Hagen had been drinking during the day and was asleep when the visitors arrived. On his way to the door, Mr. Hagen picked up his .12 gauge shotgun which he routinely kept halfway between the front door and the bedroom. (Trial Transcript, Vol. IV, p. 30). Mr. Hagen

testified at trial that he awoke to loud banging on his front door and when he asked who was there, he heard someone say "open up" but did not recognize the voice. (Trial Transcript, Vol. IV, pp. 34, 35, 54, 55).

The testimony about what occurred next varies between the witnesses. Mr. Hagen testified that when he opened the front door, he was suddenly attacked. (Trial Transcript, Vol. IV, p. 34). Mr. Hagen contends that he did not know who was attacking him but that he managed to hit the assailant on the head with the gun. The struggle continued and Mr. Hagen believed the man was renewing his attack. (Trial Transcript, Vol. IV, p. 35). Mr. Hagen shot his gun and hit Mr. Enger in the left arm. (Trial Transcript, Vol. IV, pp. 35, 84). Mr. Hagen then heard footsteps to his left and believed that someone else was coming toward him. (Trial Transcript, Vol. IV, pp. 39, 60-62). He did not know who the person was and shot in that direction killing Alice Goodrich. (Trial Transcript, Vol. IV, p. 36).

The testimony of Mr. Enger and Mr. Cobeen differ from that of Mr. Hagen. Specifically, Mr. Cobeen testified that when the door to the home opened, Alice, Gabby and Jim walked inside. Then Mr. Hagen escorted Gabby outside onto the porch and said in an angry tone, "Just go." (Trial Transcript, Vol. III, p. 173). Then Mr. Cobeen heard a loud noise like a man hitting the floor and then he heard a man

say, "Now, Jim, don't fuck with me or I will kill you." (Trial Transcript, Vol. III, p. 175).[1] Mr. Cobeen then heard two more gunshots.

Mr. Enger testified that when the door opened he went in, got hit over the head twice and then he went to leave. (Trial Transcript, Vol. III, p. 126). As he was trying to leave he testified that Bruce said, "Jim, get out or I'm going to kill you." (Trial Transcript, Vol. III, p. 132). He was then shot in the left arm.

Gabby Hagen's testimony differs somewhat from that of Mr. Cobeen in that she testified that when the door opened she went into the home with Mr. Enger and a struggle ensued between Jim and her husband. Not liking violence and having imbibed that evening she immediately went back to the restroom and got sick. (Trial Transcript, Vol. III, pp. 72-75).

Steve Jennette did not testify at trial.

IV. PROCEDURAL BACKGROUND

In 1993, Petitioner was charged with deliberate homicide for the death of Alice Goodrich and aggravated assault for the injury of Jim Enger. Petitioner pled not guilty to the charges and asserted the defenses of justifiable use of force and defense of an occupied structure. The case was tried to a jury in 1994 and Petitioner was convicted and sentenced to life for

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[1]Mr. Cobeen's testimony at trial differed somewhat from his written statement made immediately following the events. In his written statement, Mr. Cobeen stated that he "heard a struggle and heard Bruce say to Jim don't mess with me or I'll kill you."

deliberate homicide and 20 years for aggravated assault.

Petitioner appealed his conviction raising two issues: 1) whether the District Court erred in refusing Petitioner's proposed jury instruction on the justifiable use of force in defense of an occupied structure; and 2) whether Petitioner was denied effective assistance of counsel. *State v. Hagen*, 903 P.2d 1381, 1386 (Mont. 1995)(hereinafter "*Hagen I*"). The ineffective assistance of counsel issue was predicated on four alleged failings by trial counsel: (1) failure to object to the prosecutor's reference to missing witness Steve Jennette during voir dire; (2) failure to request an instruction on Petitioner's right to rely on appearances when asserting the defense of justifiable use of force; (3) failure to request an instruction on negligent homicide as a lesser offense; and (4) failure to call a witness whose testimony tended to impeach the credibility and accuracy of the testimony of Reece Cobeen. *Hagen I,* 903 P.2d at 1386-88. The Montana Supreme Court affirmed the conviction on all issues. *Hagen I,* 903 P.2d at 1389.

On April 14, 1997, Petitioner filed a petition for post-conviction relief in state district court and raised nine claims of ineffective assistance of trial counsel. Petitioner asserted that none of his claims could have been raised on direct appeal because they required an evidentiary hearing. Petitioner also contended that appellate counsel was ineffective for raising his lesser included instruction claim on direct appeal when it required an evidentiary hearing. Finally,

Petitioner alleged that, in the event some or all of the claims relating to trial counsel's ineffective assistance were barred as a result of not being raised on direct appeal, his appellate counsel had provided ineffective assistance in failing to present significant and obvious issues on appeal.

The District Court dismissed all claims in the petition on June 13, 1997 and Petitioner appealed the dismissal. In *Hagen v. State*, 973 P.2d 233 (Mont. 1999) (hereinafter "*Hagen II*"), the Montana Supreme Court affirmed in part and reversed in part holding that certain allegations of ineffective assistance of counsel were not based on facts in the record, were properly raised in the petition for post-conviction relief, and, therefore, an evidentiary hearing was necessary. All other allegations of ineffective assistance of counsel which were record based were dismissed on procedural grounds.

On March 13, 2000, the District Court held an evidentiary hearing and on June 29, 2000 issued its Findings of Fact, Conclusions of Law and Amended Sentence. (Dkt. # 8, Exh. O, pp. 286-295).[2] The District Court denied Petitioner a new trial, but granted him partial post-conviction relief by ordering that his aggravated assault sentence run concurrently with his deliberate homicide sentence. On July 11, 2000, Petitioner appealed the District Court's judgment which was affirmed by the Montana Supreme Court on

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[2]The Court notes the parties compliance with new Local Rule 7.1(k) requiring the numbering of all pages in all exhibits. This has made the Court's job easier and it is much appreciated.

August 29, 2002. *State v. Hagen*, 53 P.3d 885 (Mont. 2002)(hereinafter "*Hagen III*").

V. PETITIONER'S ALLEGATIONS

Petitioner has raised the following grounds for relief in this his federal petition for writ of habeas corpus. For purposes of clarity, the Court will also note when each claim was raised and the basis of its denial by the Montana Supreme Court.[3]

1. That his right to due process of law was violated when the state district court failed to review the entire record prior to entering its findings of fact, conclusions of law and amended sentence. This claim was raised in Petitioner's second appeal of his petition for post-conviction relief and the Montana Supreme Court denied this issue on the merits. (*Hagen III*).

2. That Petitioner's due process rights were violated when his convictions were not reversed despite the district court's conclusions that his trial counsel's performance was deficient, that the deficient performance affected the guilt/innocence determination and that he was entitled to a remedy. To the extent this claim was raised under *Strickland v. Washington*, 466 U.S. 668 (1984) it was raised in Petitioner's second appeal of his petition for post-conviction relief and the Montana Supreme Court denied the claim on the merits. (*Hagen III*).

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[3]This list of claims is based on Petitioner's original petition (Dkt. # 1). Petitioner changed the order of his claims, added some claims and did not address some claims in his brief filed in support of his petition. (Dkt. # 22).

3. That Petitioner was denied his right to effective assistance of trial counsel for the following reasons:

A. Trial counsel failed to interview witnesses and to investigate the facts of the case in that he:

i. Failed to investigate Jim Enger's reputation for violence, heavy drinking and tumultuous conduct. This claim was raised in Petitioner's first petition for post-conviction relief and dismissed on the merits by the Montana Supreme Court in *Hagen III*, 53 P.3d at 891-892.

ii. Failed to interview and properly cross-examine Reece Cobeen, a critical prosecution witness. This claim was raised in Petitioner's first petition for post-conviction relief and dismissed on the merits by the Montana Supreme Court in *Hagen III*, 53 P.3d at 892-893.

iii. Failed to introduce the transcript of the 911 call which Petitioner placed on the date of the incident. This issue was denied on the merits by the Montana Supreme Court in *Hagen III*, 53 P.3d at 893.

iv. Failed to call witnesses to testify to the inconsistences in Reece Cobeen's testimony. This claim was raised on direct appeal and in Petitioner's first petition for post-conviction relief. It was denied on the merits on the direct appeal (*Hagen I*) and denied on the basis of res judicata in the appeal of the denial of the first petition for post-conviction relief (*Hagen II*).

v. Failed to question Petitioner's ophthalmologist regarding Petitioner's uncorrected vision. This issue was raised in Petitioner's first petition for post-conviction relief and decided by the Montana Supreme Court on the merits in *Hagen III*.

B. Trial counsel failed to call Marvin Geyman to rebut the testimony of Reece Cobeen. This claim was raised on direct appeal and in Petitioner's first petition for post-conviction relief. It was denied on the merits on the direct appeal (*Hagen I*) and denied on the basis of res judicata in the appeal of the denial of the petition for post-conviction relief. (*Hagen II*).

C. During voir dire, trial counsel permitted the jury to be exposed to prejudicial references to the statements of a missing eyewitness. This claim was raised on direct appeal and dismissed on the merits by the Montana Supreme Court. (*Hagen I*).

D. Trial counsel failed to object to the State's comments on Gabriel Hagen's invocation of spousal privilege. This claim was raised for the first time in Petitioner's first petition for post-conviction relief. The Montana Supreme Court determined that it was a record based issue which should have been raised on direct appeal. It therefore found the issue to be procedurally barred under Mont. Code Ann. § 46-21-105(2). (*Hagen II*). Petitioner later raised this issue as a basis of his claim that appellate counsel was ineffective. In *Hagen III*, the Montana Supreme Court disagreed concluding that appellate counsel did not err by failing to raise the issue on appeal.

E. Trial counsel failed to object to inappropriate opinion testimony regarding Petitioner's credibility based upon two videotapes of Petitioner's interviews with the police. This claim was raised for the first time in Petitioner's first petition for post-conviction relief. The Montana Supreme Court determined that it was a record based issue which should have been raised on direct appeal. It therefore found the issue to be procedurally barred under Mont. Code Ann. § 46-21-105(2). (*Hagen II*). Petitioner later raised this issue as a basis of his claim that appellate counsel was ineffective. The Montana Supreme Court disagreed. (*Hagen III*).

F. Trial counsel improperly elicited vouching testimony from Deputy Hansen regarding Reece Cobeen. This claim was raised for the first time in Petitioner's first petition for post-conviction relief. The Montana Supreme Court determined that it was a record based issue which should have been raised on direct appeal. It therefore found the issue to be procedurally barred under Mont. Code Ann. § 46-21-105(2). (*Hagen II*). Petitioner later raised this issue as a basis of his claim that appellate counsel was ineffective. The Montana Supreme Court disagreed and declined to find ineffective assistance of counsel based on this single instance. (*Hagen III*).

G. Trial counsel failed to object to the State's introduction of the autopsy report which indicated the cause of death was homicide. This claim was raised for the first time in Petitioner's first petition for post-conviction relief. The Montana

Supreme Court determined that it was a record based issue which should have been raised on direct appeal. It therefore found the issue to be procedurally barred under Mont. Code Ann. § 46-21-105(2). (*Hagen II*). Petitioner later raised this issue as a basis of his claim that appellate counsel was ineffective. The Montana Supreme Court disagreed concluding that appellate counsel did not err by failing to raise the issue on appeal. (*Hagen III*).

H. Trial counsel failed to request a specific jury instruction on Defendant's right to rely on appearances in connection with the defense of justifiable use of force. This claim was raised on direct appeal and dismissed on the merits by the Montana Supreme Court in *Hagen I.*

I. Trial counsel failed to request an instruction on the lesser included offense of negligent homicide. This claim was raised on direct appeal and dismissed on the merits by the Montana Supreme Court in *Hagen I.* Petitioner then complained in his first petition for post-conviction relief that appellate counsel had erred in raising this issue on appeal as it required an evidentiary hearing. The Montana Supreme Court disagreed and dismissed the claim in *Hagen III*, 53 P.3d at 896.

J. Trial counsel inappropriately shifted the burden of proof during closing argument. This claim was raised in Petitioner's first petition for post-conviction relief. The Montana Supreme Court determined that it was a record based issue which should have been raised on direct appeal. It therefore

found the issue to be procedurally barred under Mont. Code Ann. § 46-21-105(2). (*Hagen II*). Petitioner later raised this issue as a basis of his claim that appellate counsel was ineffective. The Montana Supreme Court disagreed finding that the jury was correctly informed about the law and appellate counsel was not ineffective for failing to raise the issue on appeal. *Hagen III*, 53 P.3d at 896.

K. Trial counsel was ineffective in the manner in which he obtained and disseminated mental health evaluations of Petitioner to the Court and the prosecution. This claim was raised for the first time in Petitioner's first petition for post-conviction relief. The Montana Supreme Court determined that it was a record based issue which should have been raised on direct appeal. It therefore found the issue to be procedurally barred under Mont. Code Ann. § 46-21-105(2). (*Hagen II*). Petitioner later raised this issue as a basis of his claim that appellate counsel was ineffective. The Montana Supreme Court disagreed finding that Petitioner had not demonstrated how the information from the evaluations damaged his defense or lengthened his sentence. *Hagen III*, 53 P.3d at 894.

L. The cumulative errors of trial counsel constituted ineffective assistance of counsel. The Court could not find where this issue was raised. Although Petitioner complained in his second appeal of his petition for post-conviction relief regarding the cumulative effect of the errors of his appellate counsel, there is no such similar allegation regarding his trial

counsel.

4. Appellate counsel failed to raise significant, record based, errors on appeal. This issue was raised in Petitioner's second appeal of his petition for post-conviction relief and was denied on the merits. *Hagen III*, 53 P.3d at 896.

Petitioner briefed two additional claims in his brief in support of his habeas petition filed after Respondent's Answer to the petition. Neither of these claims was raised in Petitioner's original petition. The first new claim raised in his brief, claim C1b, discusses how Petitioner's counsel was ineffective for failing to cross-exam Jim Enger about the civil suit that Mr. Enger had filed against Mr. Hagen. This claim was raised in the state courts below in the second appeal of Petitioner's petition for post-conviction relief.

The second new claim, claim C4, was that Petitioner's counsel asked the county coroner, Mark Denke to comment on the credibility of Petitioner's wife, Gabby Hagen. In his second appeal of the denial of his petition for post-conviction relief, Petitioner merely discussed the facts regarding Mr. Denke's comments in his argument regarding his spousal privilege claim. (Dkt. # 9, pp. 356-357). Petitioner did not specifically raise this issue as a claim and did not fairly present it to the state courts. Accordingly, this claim is not exhausted, it is procedurally defaulted and will not be reviewed by this Court.

VI. ANALYSIS

A. Claim 3L–Cumulative Effect of Trial Counsel's Errors

Before a federal court can entertain a petition for writ of habeas corpus filed by a state prisoner, the petitioner must exhaust available state remedies with respect to claims he seeks to raise in federal court. 28 U.S.C. § 2254(b)(1)(A), (c); *Rose v. Lundy*, 455 U.S. 509, 522 (1982). The exhaustion requirement is grounded in principles of comity; that is, it avoids the "unseemliness" of a federal court's overturning of a state conviction or decision, and it reflects a desire to protect the state courts' role in the development and enforcement of federal law. *Young v. Kenny*, 907 F.2d 874, 876 (9th Cir. 1989) (citing *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973)).

Consequently, the federal court must dismiss the federal petition if the petitioner has failed to exhaust the available state remedies. 28 U.S.C. § 2254(b); *Wasko v. Vasquez*, 820 F.2d 1090, 1092 (9th Cir. 1987).

The exhaustion requirement means that "state prisoners must give the state courts one full opportunity to resolve any [federal] issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (emphasis added).

Claim 3L is a claim regarding the cumulative effect of trial counsel's errors. As pointed out by Respondent, this claim was not raised in any of Petitioner's underlying state court actions. Although Petitioner did raise a claim in state court regarding the cumulative effect of appellate counsel's errors, no such claim was raised regarding trial counsel's alleged

errors. As such, this claim has not been exhausted.

Exceptions to the exhaustion doctrine exist. See 28 U.S.C. § 2254(b). For example, where requiring exhaustion would be futile because a petitioner is procedurally barred from seeking state remedies, the petitioner is not required to return to state court. In such a case, the unexhausted claims could be deemed exhausted.

Here, Petitioner would be procedurally barred from raising his cumulative ineffectiveness of trial counsel claim. Petitioner cannot file another petition for post-conviction relief because it would be banned as a second or successive petition. See Mont. Code Ann. § 46-21-105(1)(b) (barring second petitions unless it raises grounds for relief that could not reasonably have been raised in the first petition). Moreover, habeas relief is not available under Montana state law to challenge a conviction or sentence. Mont. Code Ann. § 46-22-101(2) (2001).

The Court must conclude that Petitioner is precluded from further proceedings in state court. Accordingly, the Court deems Claim 3L exhausted but procedurally defaulted.

B. Procedural Default

In general, federal courts cannot review a decision of a state court on an issue of federal law if the decision was based on a provision of state law "that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). The adequate and independent state grounds doctrine arises from concerns for comity

and federalism. *Id.* at 730.

Generally, a state's procedural bar is an adequate and independent ground for the preclusion of relief and is not subject to federal review. *Harris v. Reed*, 489 U.S. 255, 263 (1989). In such cases, a petitioner is said to have procedurally defaulted on his claims for relief.

Respondent argues that Claims 3D, E, F, G, J, K and L are procedurally defaulted. The Montana Supreme Court found that claims 3D, E, F, G, J, and K were ineffective assistance of counsel claims raised by Petitioner which were record based claims that should have been raised on direct appeal. Accordingly, the Montana Supreme Court determined that each of these claims was procedurally barred on the basis of Mont. Code Ann. § 46-21-105(2) and on the doctrine of res judicata because they reasonably could have been raised on direct appeal and were not. *Hagen II*, 973 P.2d at 237 (citing *State v. Bromgard*, 901 P.2d 611, 613 (Mont. 1995)).

The Court concludes that Mont. Code Ann. 46-21-105(2) and the doctrine of res judicata are both adequate and independent grounds for the preclusion of relief. Therefore, Petitioner has procedurally defaulted on his ineffective assistance of counsel claims 3 D, E, F, G, J, K and L.

As set forth above, claim 3L is procedurally defaulted because it has not been raised and Petitioner is precluded from further state court proceedings on this issue.

While there are exceptions to the general

rule of dismissal for procedural default, none have been asserted in this case. Respondent argued that each of these claims was procedurally defaulted and Petitioner, represented by counsel, does not argue, that there was cause and prejudice attendant to his failure to raise these claims on appeal in state court.

> Once a procedural default is found to exist, then:
>
> federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman, 501 U.S. at 750. Accordingly, Petitioner needed to demonstrate either (1) cause, and (2) prejudice; OR that this Court's failure to consider his claims would result in a fundamental miscarriage of justice.

"Cause" must be a legitimate excuse for the procedural default in the state courts. *See Thomas v. Lewis*, 945 F.2d 1119, 1123 (9th Cir. 1991). "A showing of cause [for procedural default] 'must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.'" *Poland v. Stewart*, 117 F.3d 1094, 1105 (9th Cir. 1997) (emphasis added) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). "Prejudice" must be actual harm resulting

from the constitutional violation alleged as grounds for relief in the petition. *Thomas*, 945 F.2d at 1123.

The "fundamental miscarriage of justice" exception requires a showing that "it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt" if the errors of which he complains had not been committed. *Schlup v. Delo*, 513 U.S. 298, 327 (1995); *see also Majoy v. Roe*, 296 F.3d 770 (9th Cir. 2002). This exception is commonly called the "actual innocence" exception.

Constitutionally ineffective assistance under the Sixth Amendment constitutes cause sufficient to excuse a procedural default. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). As discussed below, Petitioner's assertion that his appellate counsel rendered ineffective assistance of counsel by failing to raise claims 3 E, F, G, J, K, and L on appeal is not supported by the record.[4]

Petitioner's procedural default could also be excused if he could show actual, factual innocence, not just legal insufficiency of the evidence. To establish actual innocence, Petitioner would need to demonstrate in light of all the evidence, including new evidence that might be introduced by both sides, that "it is more likely than not that no reasonable juror would have convicted him." *Bousley*, 523 U.S. at 623 (internal quotation marks and citations omitted).

[4]As set forth below, the Court finds that Petitioner's appellate counsel did render ineffective assistance of counsel by failing to raise claim 3D regarding Mrs. Hagen's invocation of spousal privilege. Therefore, Claim 3D is not procedurally defaulted.

Petitioner has not, however, attempted to show that he is actually innocent of the crimes charged.

Petitioner has, therefore, failed to show that he should be excused from his procedural default.

Accordingly, Claims 3 E, F, G, J, K, and L should be dismissed for being procedurally defaulted.

C. Do Claims 1 and 2 raise a federal right?

Respondent contends that grounds 1 and 2 are conclusory and fail to state a federal question. The Court disagrees. With regard to Petitioner's first claim, it is true that Petitioner did not cite to a federal case in his actual petition filed with this Court. However, Petitioner does discuss in both his state court briefs and in his brief in support of his petition (Dkt. # 22) that once a state has "chosen to provide collateral post-conviction procedures for convicted prisoners, those procedures must, at least, comport with the base-line of due process – i.e., they must comport with 'fundamental' fairness.'" *Jackson v. Duckworth*, 844 F.Supp. 460, 464 (N.D.Ind. 1994); *Easter v. Endell*, 37 F.3d 1343 (8th Cir. 1994). Petitioner also cited to *Evitts v. Lucey*, 469 U.S. 387, 401 (1985) in support of this contention. (Dkt. # 22, pp. 10-11; Dkt. # 8, pp. 327-328).

Accordingly, Ground 1 presents a federal question which was fairly presented to the state courts for review.

Petitioner's second ground for relief is similar but presents somewhat of a different situation. Respondent is correct that Petitioner mentioned a

due process violation for the first time in his federal petition. This claim was not raised in the state court, is unexhausted, procedurally defaulted and should be dismissed.

Nevertheless, in his Brief in Support of his Petition (Dkt. # 22), Petitioner presents the same federal claim that was presented in the state court. (Dkt. # 22, pp. 12-16; Dkt. # 8, pp. 338-42). The Court construes this claim as an ineffective assistance of counsel claim submitted under *Strickland*. Petitioner's second claim is an allegation that the trial court erred in its analysis under the Sixth Amendment when it found that there was deficient performance and that the deficient performance prejudiced the defense yet only adjusted Petitioner's sentence and did not order a new trial.

This claim was sufficiently exhausted, it raises a federal claim under the Sixth Amendment and the Court will review the merits of this claim.

D. Legal Standard

This action is subject to the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which became effective on April 24, 1996. *Lindh v. Murphy*, 521 U.S. 320, 326 (1997); *Weaver v. Thompson*, 197 F.3d 359, 362 (9th Cir. 1999).

AEDPA "modifies the role of federal habeas courts in reviewing" habeas petitions. *Williams v. Taylor*, 529 U.S. 362, 403 (2000)(O'Connor, J., concurring). "The Supreme Court has said that § 2254(d)(1) imposes a 'highly deferential standard for evaluating state-court rulings,' and 'demands that state court decisions be

given the benefit of the doubt.'" *Clark v. Murphy*, 331 F.3d 1062, 1067 (9th Cir. 2003)(citing *Lindh*, 521 U.S. at 333 n.7 and *Woodford v. Visciotti*, 537 U.S. 19, 123 S.Ct 357, 360 (2003)(per curiam)).

Following the AEDPA's enactment, 28 U.S.C. § 2254(d) now reads as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

"A state court's decision is 'contrary to' federal law if the state court (1) 'applies a rule that contradicts the governing law' set forth in Supreme Court case authority or (2) applies controlling law to a set of facts that are 'materially indistinguishable' from a Supreme Court decision but nevertheless reaches a different result." *Ortiz-Sandoval v. Clarke*, 323 F.3d 1165, 1169 (9th Cir. 2003)(citing *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003)).

"A state court's decision is an 'unreasonable application' of federal law if it is 'objectively unreasonable,' which 'requires the state court decision to be more than incorrect or erroneous.' Thus, 'an unreasonable application is different from an incorrect one.'" *Id.* at 1169-1170 (citing *Lockyer*, 538 U.S. at 75 and *Bell v. Cone*, 535 U.S. 685, 122 S.Ct. 1843, 1850 (2002)).

With regard to factual issues, habeas relief can only be granted if the adjudication of the claim resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d)(2). "As to more debatable factual determinations, the care with which the state court considered the subject may be important." *Jeffries v. Wood*, 114 F.3d 1484, 1500 (9th Cir. 1997)(en banc) *cert. denied* 522 U.S. 1008 (1997) *overruled on other grounds by Lindh*, 521 U.S. 320. Further, AEDPA directs that factual findings of the state court be granted a presumption of correctness that can only be rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Jeffries*, 114 F.3d at 1499-1500.

Based on the foregoing statutory structure for granting habeas relief, the Court will analyze Petitioner's contentions in light of the applicable federal law and the Montana Supreme Court's decisions on Petitioner's claims for relief.

E. Merits of Claims 1, 2, 3A, B, C, H, J and 4

1. Due Process Violation–Not Reviewing Entire Record

The state district court made a specific conclusion of law that in making its conclusions, it did "not review the entire trial proceedings." Petitioner contends that the district court had an obligation to review the trial record since his claims were record based and that its failure to do so deprived him of due process. The Montana Supreme Court found that the post-conviction statutes (which Petitioner relied upon to establish a due process claim) do not explicitly require that a district court review the entire record. It pointed out that in a situation such as this where the district judge who presided over the post-conviction hearing was the same judge who presided at trial, it was less important to review the entire trial record. The Montana Supreme Court held that the district court had a duty to review those parts of the record which were at issue in the post-conviction proceedings but would not require a court to review the entire record in every case.

This Court cannot say that state court's determination was contrary to or involved an unreasonable application of clearly established federal law or was based on an unreasonable determination of the facts in light of the evidence presented.

2. Ineffective Assistance of Counsel Claims 2-4

Petitioner's second, third and fourth grounds

for relief all raise issues of ineffective assistance of counsel. To demonstrate ineffective assistance of counsel a petitioner must show that (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). However, just showing a different result is insufficient. *Strickland* mandates a showing of conduct that is "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. Because both prongs of the *Strickland* test must be met, the court need not analyze whether counsel's performance was deficient if the petitioner fails to show actual prejudice from the alleged deficiency. *Strickland*, 466 U.S. at 697. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id.*

The Supreme Court has also cautioned that "judicial scrutiny of counsel's performance must be highly deferential" because "it is all too tempting for a defendant to second guess counsel's assistance after a conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id.* at 689. The Supreme Court further cautioned that "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable

professional assistance." *Id.*

Under the prejudice prong, a reasonable probability of a different result is one sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. In determining the existence of prejudice, the court "must consider the totality of the evidence before the judge or jury." *Id.* at 695.

The Montana Supreme Court utilized the two prong test set forth in *Strickland* and considered whether counsel's performance was deficient and whether that deficiency was "so serious as to deprive the defendant of a fair trial." *Id.* at 687.

a. Claim 2--Whether the district court's findings and conclusions were inconsistent?

Petitioner's second claim is that his Sixth Amendment rights were violated when the trial court did not reverse his conviction after finding that trial counsel's performance was deficient, that the deficient performance affected the guilt/innocence determination and that Petitioner was entitled to a remedy.

The Montana Supreme Court reviewed the district court's findings and disagreed with Petitioner's contention that the findings and conclusions were inconsistent. The Montana Supreme Court held that "it is entirely possible within the framework of *Strickland* to find attorney error which possibly prejudiced the defendant, yet conclude that such error did not rise to a level serious enough to result in a

verdict unworthy of confidence." *Hagen III*, 53 P.3d at 891, ¶23. The Montana Supreme Court found that the "controlling language of the District Court's conclusions of law are those that track the dispositive elements of the *Strickland* analysis." *Id.*

The trial court found and the supreme court agreed that there was some prejudice but not enough prejudice to undermine confidence in the jury's verdict. It is not unreasonable to determine that although there was some prejudice, such prejudice was not sufficient to undermine the confidence in the jury's verdict. *U.S. v. Walters*, 904 F.2d 765, 771-772 (1st Cir. 1990). However, the district court's ultimate conclusion was contradictory because after making this finding the district court nevertheless amended Petitioner's sentence on the aggravated assault charge to have it run concurrent with the deliberate homicide sentence. The court determined that any prejudice only applied to the aggravated assault charge and not the deliberate homicide charge.

Based upon the record of this case, it was unreasonable for the trial court to find that there was enough prejudice to change the sentence on the aggravated assault conviction but not the verdict. If the trial court determined that the prejudice was sufficient to adjust the sentence then it presumably found that the prejudice undermined confidence in the jury's verdict on the aggravated assault conviction. What is at issue is more than how much time Mr. Hagen must serve in prison. It also involves the propriety of the actual convictions against him. If trial counsel's

errors undermine confidence in the jury's verdict on the aggravated assault conviction, then the remedy must be to overturn that conviction. The state court's determination to uphold the district court's remedy of adjusting the sentence was unreasonable.

Petitioner contends that the ineffective assistance of counsel in this regard not only goes to aggravated assault conviction but also to the deliberate homicide conviction. The Court cannot agree. Petitioner argues that the shooting of Jim Enger and Alice Goodrich were part of a single, continuous event and that "under the circumstances of this case, a legitimate self-defense claim regarding Hagen's assault on Enger also applies to the deliberate homicide charge regarding Goodrich." (Dkt. # 22, p. 15).

A review of the record indicates that even if the shooting of Mr. Enger was justified by self defense it was unreasonable of Petitioner to then turn around and begin shooting without any indication who was approaching him from behind or if they were going to attack him. Mr. Hagen testified that he "could see legs coming at me and I turned and fired. I backed away and I turned and fired. I thought it was someone else attacking from the same cohort companion of this person that attacked me. . . . I think I would have shot my mother. I would have shot anybody. I just reacted." (Trial Transcript, Vol. IV, p. 36, lines 6-10, 19-20).

Mont. Code Ann. § 45-3-102 provides that:

[a] person is justified in the use of force or

> threat to use force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of force likely to cause death or serious bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or serious bodily harm to himself or another or to prevent the commission of a forcible felony.

The jury could have easily concluded, even if Mr. Hagen was justified in shooting Mr. Enger, that his belief that deadly force was necessary with regard to Ms. Goodrich was unreasonable. He shot indiscriminately without regard for who was approaching him and without any indication that the person intended to cause him harm.

Therefore, it was not an unreasonable determination of the facts in light of the evidence to find that there was not enough prejudice to undermine confidence in the deliberate homicide conviction.

b. Claims 3Ai (petition) and C4 (brief): Failure to present evidence about Jim Enger

Petitioner contends that his trial counsel failed to investigate or offer evidence of James Enger's reputation for violence, heavy drinking and trouble-making. He also asserts that trial counsel should have cross-examined Mr. Enger about the civil lawsuit he

filed against Mr. Hagen. Petitioner alleges that the introduction of such evidence would have impacted Enger's credibility as a witness.

Both Mr. Hagen and his daughter Kendra testified at the post-conviction evidentiary hearing that counsel independently explained to each of them that because Mr. Hagen was unable to identify his attackers at the time of the shootings, evidence of the violent propensities of Mr. Enger would be inadmissible at trial. (Evidentiary Hearing Transcript, pp. 7, 8, 16, 17).

Petitioner submits that evidence of Mr. Enger's reputation for violence was admissible as evidence identifying the aggressor in the incident. (Dkt. # 22, p. 20 citing *State v. Sattler*, 956 P.2d 54, 64 (Mont. 1998); Fed. Rule. Evid. 405(a); M.R.Evid 405; *State v. Jones*, 139 P.441 (Mont. 1914); *State v. Benton*, 825 P.2d 565 (Mont. 1991)). *See also State v. Logan*, 473 P.2d 833 (Mont. 1970). The Court agrees that this authority supports Petitioner's contention that evidence of Mr. Enger's reputation for violence could have been admissible as evidence that Mr. Enger was the aggressor in this incident.

The State argues that the record was silent as to whether trial counsel conducted any investigation, that the assertion that counsel misunderstood the law was speculation and that there were tactical reasons to avoid introducing this evidence.

The Montana Supreme Court found that,

> we cannot determine from the record whether Hagen's trial counsel investigated Hagen's assertions, and, if he did, what tactical reasons were considered for not introducing that information at trial. The burden was on Hagen to demonstrate ineffectiveness and Hagen's trial counsel did not testify at the evidentiary hearing. A silent record cannot rebut the 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'

Hagen III, 53 P.3d at 892, ¶ 26.

Based upon the record before this Court it appears the above finding of the Montana Supreme Court was an unreasonable application of the law to the facts. Federal law only requires a defendant to show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. Contrary to the state court's finding that the record was silent on this issue, Petitioner presented unrebutted testimony that his counsel did not introduce evidence of Mr. Enger's violent propensities (whether it be by reputation, background or criminal history) because of his misunderstanding of the law. The state could have attempted to rebut the testimony of Mr. Hagen and his daughter by presenting the testimony of trial counsel, but they did not do so. *Strickland* instructs

that a defendant "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. at 101). Petitioner overcame this presumption by presenting unrebutted testimony that counsel's decision to not investigate or introduce any such evidence was made based upon a misunderstanding of state law. Thus the state court's finding that there was a "silent record" on this issue was unreasonable.

However, as discussed above, any error regarding the failure to introduce evidence regarding Mr. Enger's violent propensities only affects the verdict regarding the aggravated assault charge, not the deliberate homicide charge.

c. Claims 3Aii, 3Aiv, 3B regarding the Testimony of Reece Cobeen

Petitioner argues that his trial counsel's performance was deficient with respect to the testimony of Reece Cobeen. Petitioner contends that his counsel failed to interview Cobeen, failed to cross-examine Cobeen regarding his pre-trial statement and failed to offer other evidence (including rebuttal witnesses) to impeach Mr. Cobeen. Respondent argues that this issue was barred by the doctrine of res judicata and therefore is procedurally defaulted. The Court agrees that the Montana Supreme Court found this claim to be barred by res judicata. *Hagen II*, 973 P.2d at 239; *Hagen III*, 53 P.3d at 893. However, the state court found that it was barred because this issue was raised

and resolved in Petitioner's direct appeal. Therefore, it was only barred from consideration in *Hagen II* and *Hagen III* because the state court had decided the merits of the claim in *Hagen I*. It is not barred from review in this Court. Petitioner's claim 3B has been exhausted, it has not been procedurally defaulted and the Court will examine this claim on its merits.

In *Hagen I*, the Montana Supreme Court presumed that defense counsel's failure to call a relevant witness regarding Mr. Cobeen's location at the time of the shooting resulted in deficient representation and considered therefore, "whether a reasonable probability exists that but for counsel's deficient performance, the trial's outcome would have been different." *Hagen I*, 903 P.2d at 1389 (quoting *State v. Sheppard*, 890 P.2d 754, 757 (Mont. 1995)). The Montana Supreme Court concluded that "Cobeen's location in relationship to the front porch, while relevant to this case, is not dispositive. A review of the record reveals, absent Cobeen's testimony in its entirety, substantial evidence to support the jury's verdict." *Id.*

As set forth above, the Court must consider the state court's factual findings and grant habeas relief only if the adjudication of the claim resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d)(2).

The state district court made findings of fact and conclusions of law regarding this issue.

Specifically, the trial court found that trial counsel did not interview Mr. Cobeen prior to trial but did cross-examine Mr. Cobeen and did use one of Mr. Cobeen's pre-trial statements in said cross-examination. The trial court further found that trial counsel did not interview Marvin Geyman as a potential witness to impeach Mr. Cobeen but there was no evidence introduced regarding what that testimony may have established. (Dkt. # 8, Exhibit 0, p. 287)

Based upon these findings the trial court concluded that, "counsel could have done a more thorough job of interviewing and preparing witnesses, and Defendant may have suffered some prejudice as a result thereof." However, the trial court also found that counsel provided reasonably effective assistance and that Petitioner received a fair trial and the result and jury verdict are reliable. (Dkt. # 8, Exhibit O, pp. 6-7).

Accordingly, both the state district court and the Montana Supreme Court found that there was substantial evidence to support the jury's verdict. AEDPA directs that factual findings of the state court be granted a presumption of correctness that can only be rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Jeffries*, 114 F.3d at 1499-1500.

Petitioner faults his counsel in a number of respects. First, he contends that counsel should have cross-examined Mr. Cobeen about his location at the time of the shooting because of Mr. Cobeen's testimony about petting a goat at the time of the incident. Petitioner argues that the goat was tethered

a significant distance from the Hagen residence and therefore Mr. Cobeen would not have been able to hear the voices and other sounds about which he testified. However, the testimony of Mr. Hagen at the evidentiary hearing indicates that the goat was chained near the house.[5] Specifically, Mr. Hagen testified that they kept the goat on a chain "because it would eat through a rope. And right there at the house, it can go underneath the house for shelter." (Evidentiary Hearing Transcript, p. 25).

Petitioner also finds fault with counsel's failure to cross-examine Mr. Cobeen about not seeing Ms. Goodrich's body. However, it seems entirely plausible that Mr. Cobeen who ran away from the scene after hearing the shots did not see Ms. Goodrich's body. Therefore, the state court's conclusion that counsel was not ineffective for failing to cross-examine on this point was not objectively unreasonable.

Petitioner also faults counsel for failing to impeach Mr. Cobeen with his written pre-trial statement which varied slightly from his trial testimony. The Court recognizes the difference in Mr. Cobeen's testimony. Mr. Cobeen testified at trial that he heard Petitioner say to Mr. Enger, "Don't fuck with me, Jim, or I will kill you." (Trial Transcript, Vol. IV, p. 9). In Mr. Cobeen's first written statement he wrote that he "heard a struggle and heard Bruce

[5]Although Mr. Hagen was referring to a photograph at the evidentiary hearing, no such photograph was presented to this Court. Therefore, the Court must rely on the transcribed testimony of Mr. Hagen which indicates that the goat was tethered so that the goat could go under the house for shelter.

say to Jim don't mess with me or I'll kill you." (Dkt. # 23, Appendix B–App-82-83). The distinction being that at trial, Mr. Cobeen included the name Jim in his quotation of Petitioner's statement, but in the written statement he did not include the name Jim. However, counsel cross-examined Mr. Cobeen about this distinction. (Trial Transcript, Vol. IV, pp. 9-10).

Moreover, the Ninth Circuit has held that counsel's decision not to use prior inconsistent statements for impeachment purposes is a matter of trial tactics and is not ineffective assistance. *See Gustave v. United States,* 627 F.2d 901, 905 (9th Cir. 1980) (addressing a counsel's failure "to utilize prior sworn testimony of various witnesses in an effort to destroy their in-court identification with alleged inconsistencies" and concluding failure was "obviously a matter of trial tactics and falls far short of ineffective counsel").

The Court finds that the state court's factual findings with regard to the above stated issues were not objectively unreasonable.

Petitioner next contends that two witnesses were available to impeach Mr. Cobeen regarding his location at the time of the shooting. Specifically, Petitioner's daughter testified at the evidentiary hearing that Mr. Cobeen told her he was at a different location at the time of the shooting than what he testified to at trial. (Evidentiary Hearing Transcript, p. 11). In addition, Petitioner argues that another witness, Marvin Geyman, was available to testify that Mr. Cobeen had told him he was some distance

from the Hagen residence at the time of the shooting. However, as the trial court found, no evidence was introduced at the evidentiary hearing or to this Court regarding what Mr. Geyman's testimony may have established. (Dkt. # 8, Exhibit O, p. 287). Petitioner also argues that trial counsel compounded the issue with Mr. Cobeen's credibility when he sought and receive "vouching" testimony about Mr. Cobeen from a law enforcement officer.

The state court made a specific finding that Mr. Cobeen's location at the time of the shootings was relevant but not dispositive. The court found even without Mr. Cobeen's testimony, there was substantial evidence to support the jury's verdict. This Court cannot say that this was an unreasonable determination of the facts in light of the evidence presented with regards to the deliberate homicide conviction but that it is unreasonable with regard to the aggravated assault conviction.

As Petitioner points out, Mr. Cobeen's testimony was important to the prosecution because he testified that he heard Petitioner shout, "Now Jim, don't fuck with me or I will kill you." (Trial Transcript, Vol. III, p. 175). According to Petitioner, this testimony undermined Petitioner's affirmative defense by showing if true, that Petitioner identified his primary assailant before shooting and wounding him. (Dkt. # 22, p. 23). However, as the state supreme court pointed out, Mr. Enger also testified at trial that Petitioner said, "Jim, get out or I'm going to kill you. Get out of my house or I'm going to kill you." (Trial Transcript,

Vol. III, p. 132). The state supreme court also relied on the testimony of Petitioner's wife who testified that she had invited the victims to her home. The state court additionally focused on the facts that the victims were unarmed at the time of the incident and Petitioner himself testified that he turned and shot Ms. Goodrich without regard at whom he was firing. *Hagen I*, 903 P.2d at 1389.

The Court does not agree with the state court's conclusion that even without Mr. Cobeen's testimony, there was substantial evidence to support the jury's verdict on the aggravated assault charge. Reece Cobeen was the only sober witness to this incident, therefore, it is highly probable that the jury gave his testimony substantially more weight than the other witnesses who were all intoxicated.

Without the testimony of Mr. Cobeen, the only testimony which contradicts Mr. Hagen's self-defense theory was the testimony of Mr. Enger that Mr. Hagen said to him, "Jim, get out or I'm going to kill you." (Trial Transcript, Vol. III, p. 132). The trial court already determined that there was some prejudice regarding counsel's failure to impeach the credibility of Mr. Enger. Given the lack of impeachment of Mr. Enger, the supreme court's finding that there was substantial evidence to support the conviction without Mr. Cobeen's testimony is unreasonable. Mr. Cobeen was the key prosecution witness. His location at the time of the shooting was very relevant to the outcome of this case, as was his credibility. Given Kendra Hagen's testimony, a jury would have been free to

conclude that if Mr. Cobeen was not being completely honest about his location at the time of the shooting, he may not have been honest in other aspects of his testimony.

The state court's conclusion that there was substantial evidence to support the jury's verdict on the aggravated assault charge without the testimony of Mr. Cobeen was an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d)(2).

However, Mr. Cobeen's testimony regarding hearing a struggle and Petitioner's statements prior to shooting Mr. Enger only support the conviction on the aggravated assault charge. Mr. Cobeen gave no testimony regarding the shooting of Ms. Goodrich except for hearing the shots. A review of the record indicates that even if the shooting of Mr. Enger was justified by self defense it was unreasonable of Petitioner to then turn around and begin shooting indiscriminately without any indication that the individual approaching him from behind was attacking him.

Accordingly, this Court cannot say that the state court's adjudication of this claim as it applies to the deliberate homicide conviction resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d)(2).

d. Claim 3Aiii: 911 Transcript

Petitioner contends that his counsel was ineffective for not introducing into evidence at trial

the transcript of his call to 911 in which he stated that he was attacked in his house. The state supreme court found that while the transcript may have been admissible and may have corroborated Petitioner's testimony, counsel was not obligated to introduce cumulative evidence. *Hagen III*, 53 P.3d at 893 (citing *State v. Allen*, 37 P.3d 655 (Mont. 2001)).

Although not mentioned by the state courts, petitioner or respondent in this matter, the 911 operator was called as a witness, she described the 911 call and the 911 tape was played to the jury and introduced into evidence. (Trial Transcript, Vol. I, pp. 157-164). Petitioner argues that his counsel was ineffective for not introducing the transcript of the 911 call because it constituted highly probative evidence of Mr. Hagen's state of mind immediately following the shootings. Clearly, playing the 911 call for the jury provided this evidence to the jury in a better form than merely introducing the transcript of the call as it would have demonstrated Mr. Hagen's demeanor at the time of the call. Given the fact that the 911 call was played to the jury and introduced into evidence, this claim seems frivolous.

The Court does note that in its analysis of this issue the Montana Supreme Court cited the incorrect standard by stating that they were "unable to conclude that its [the 911 transcript's] presentation would have led to a different result." The correct standard is whether there was a reasonable probability that the introduction of the 911 transcript would have led to a different result. Nevertheless, utilizing the correct

standard it is clear that Petitioner failed to show "a reasonable probability that . . . the result of the proceeding would have been different" had the 911 transcript been introduced since the 911 tape itself was played for the jury and introduced into evidence. *See United States v. Schaflander*, 743 F.2d 714, 719 (9th Cir. 1984) (where defendant's counsel had no obligation to present cumulative evidence).

e. Claim 3Av: Failure to Prepare Ophthalmologist

Petitioner argues that his counsel failed to adequately prepare Paul Overland, M.D., one of his own witnesses for Dr. Overland's trial testimony. Dr. Overland testified at trial regarding Petitioner's corrected vision but did not testify regarding his uncorrected vision. Petitioner was not wearing his glasses at the time of the shootings but the jury was never told what Petitioner's uncorrected vision was or how it would have affected his ability to recognize the people who came knocking at his door.

The state supreme court did not directly address this issue. However, as Respondent argues, Petitioner introduced no evidence in any of his post-conviction proceedings or in this Court to demonstrate what that uncorrected vision was or how it affected his ability to recognize the people at his door. This Court cannot say without any such evidence that counsel was ineffective for not introducing that evidence. The Montana Supreme Court affirmed the state district court's finding that trial counsel could have done a better job of preparing witnesses but that

any resulting prejudice did not rise to a level serious enough to result in a verdict unworthy of confidence.

This Court does not find that this decision was contrary to federal law, involved an unreasonable application of federal law, or an unreasonable determination of the facts in light of the evidence presented.

f. Claim 3C: Voir Dire

The issue of whether counsel was ineffective for failing to object to the prosecutor's reference during jury voir dire to a witness who was not called at trial was addressed by the Montana Supreme Court on direct appeal. During voir dire a potential juror was questioned regarding his knowledge of the case based on the potential juror's conversations with Steve Jennette, a witness at the scene who was not produced at trial. In response to questioning, the potential juror stated that he knew Steve Jennette, that he had counseled him after the shootings and that he received "first hand" information about the shootings. Ultimately this juror stated that he would be uncomfortable serving as a juror based upon his knowledge of the case. Defense counsel did not object during this line of questioning.

The Montana Supreme Court found that counsel was not ineffective because no evidence concerning the substance of these conversations was presented. The supreme court determined that it may have been reasonable for defense counsel to object to the line of questioning or request an in camera inspection of the potential juror but such actions were not mandated.

Hagen I, 903 P.2d at 1387.

A criminal defendant in a state court is guaranteed an "impartial jury" by the Sixth Amendment as applicable to the States through the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145 (1968). Principles of due process also guarantee a defendant an impartial jury. See, e.g., *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

A rebuttable presumption of prejudice arises from the introduction of extraneous information into the trial process. *Dickson v. Sullivan*, 849 F.2d 403, 406 (9th Cir. 1988). The ultimate question is what was the potential effect of the information upon the jury. *Id.* This inquiry is linked to the harmless error standard and the Court must ask whether the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993).

Although the Montana Supreme Court did not specifically refer to this standard, they considered what information was presented and determined that counsel was not deficient for failing to object to the line of questioning.

Upon review of the record and utilizing the standard set forth by the United States Supreme Court, this Court finds that the venireman's comments about the absent witness did not substantially affect the jury's decision. As the state court found, no evidence concerning the substance of the potential juror's conversations with Mr. Jennette was presented. The only information was that the potential juror received

knowledge about the case from an absent witness and he would not be comfortable in sitting as a juror. What this Court finds significant is the manner in which the potential juror expressed his reluctance to sit. Specifically the potential juror stated, "Probably, in all fairness to the defendant, I would be uncomfortable." There is nothing in this statement which would substantially affect the jury's decision.

This Court does not find that this decision was contrary to federal law, involved an unreasonable application of federal law, or an unreasonable determination of the facts in light of the evidence presented.

g. Claim 3H: Instruction on Appearances

Petitioner contends that the trial court failed to request a specific instruction on Petitioner's right to rely on appearances in connection with the defense of justifiable use of force. Petitioner argues in his petition[6] that justification defenses are to be judged in light of the appearance of danger facing the defendant, rather than by the actuality of that danger. However, Petitioner cites no case law (state or federal) indicating that Petitioner would have been entitled to any such defense.

Moreover, as Respondent points out the failure to request a particular instruction is not ineffective

[6]This claim is raised in Mr. Hagen's Petition for Writ of Habeas Corpus (Dkt. #1) but it was not briefed by Petitioner in his Brief in Support of his petition. (Dkt. # 22).

where those instructions that are given by the court are adequate. *U.S. v. Feldman*, 853 F.2d 648, 666 (9th Cir. 1988).

The Montana Supreme Court found that the jury was sufficiently instructed on the defense of justifiable use of force and therefore found that trial counsel's performance was not deficient.

This Court does not find that this decision was contrary to federal law, involved an unreasonable application of federal law, or an unreasonable determination of the facts in light of the evidence presented.

h. Claim 3I: Instruction on Negligent Homicide

In his petition, Mr. Hagen argued that his counsel's failure to request a negligent homicide instruction constituted ineffective assistance of counsel. (Claim 3I, Petition, p. 22). Petitioner did not cite any case law to support this contention and did not argue this ground for relief in his brief.

Respondent argues that the Montana Supreme Court reasonably decided that trial counsel's failure to request instructions on negligent homicide was not deficient attorney-performance. Respondent cites the Montana Supreme Court's reasoning that not requesting an instruction on negligent homicide could easily be viewed as a legitimate trial tactic. Further, Respondent argues that it was a reasonable tactic for trial counsel to avoid a negligent homicide instruction for "fear of undercutting Hagen's self-defense claim." (Dkt. # 8, p. 40 citing *Casale v. Fair*, 833 F.2d 386, 392

(1st Cir. 1987)).

The Ninth Circuit has upheld trial decisions which fall "well within the bounds of reasonable trial tactics." *Beaty v. Stewart*, 303 F.3d 975,984 (9th Cir. 2002). Counsel's decision not to request an instruction on negligent homicide, although somewhat surprising given the facts of this case, does fall within the realm of a reasonable trial tactic. From this record, this Court cannot find "clear error" with the state court's decision and does not find that it was contrary to federal law or involved an unreasonable application of federal law.

i. Claim 4 Cumulative Error of Appellate Counsel

Petitioner's fourth ground for relief is that his appellate counsel failed to raise issues 3D, E, F, G, J, and K on direct appeal even though they were record based claims. He contends that appellate counsel was ineffective in failing to recognize the difference between ineffective claims that were record based and therefore appropriately raised on direct appeal and those that should have been reserved for post-conviction.

The Montana Supreme Court addressed the merits of each of these claims.

i. Spousal privilege

Petitioner contends that his appellate counsel should have raised on direct appeal his trial counsel's failure to object to the prosecutor's comments on Petitioner's wife's invocation of spousal privilege. Mrs. Hagen refused to give a statement until several months after the incident on the basis of spousal

immunity. Ultimately she did provide a statement to law enforcement and was called as a witness for the state at trial.

The Montana Supreme Court analyzed this claim as one of prosecutorial misconduct and discussed whether the prosecutor's questions were "manifestly intended or of such a character that a jury would naturally and necessarily take it as a comment on the failure of the privileged individual to testify." *Hagen III*, 53 P.3d at 895. Ultimately, the Montana court concluded that the jury would not "naturally and necessarily" have interpreted the comments of the prosecutor as comments on Gabby Hagen's invocation of spousal privilege. Therefore, they found no error with appellate counsel's failure to raise this issue on direct appeal. *Id.*

By statute in Montana, a wife cannot be examined for or against her husband without his consent. Mont. Code Ann. §26-1-802. Rule 505 of the Montana Rules of Evidence provides that "the claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by the court or counsel."

Under both state and federal law the appropriate standard for evaluating whether a comment on spousal immunity is error is whether the statement "is manifestly intended to call attention to the defendant's failure to testify, or is of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify." *Lincoln v. Sunn*, 807 F.2d 805, 809 (9th Cir. 1987); *see also State*

v. Dawson, 233 Mont. 345, 356, 761 P.2d 352, 359 (1988).

Respondent argues that the prosecutor did not comment on Mrs. Hagen's exercise of her spousal privilege. The Court disagrees. The prosecutor specifically inquired at least five times during trial that the police tried to question Mrs. Hagen and Mrs. Hagen refused on two occasions to give a statement. (Trial Transcript, Vol. I, p. 142; Vol. II, p. 54; Vol. II, p. 111; Vol. III, p. 93; and Vol. III, p. 97). Mrs. Hagen testified that she did not think she had to talk to the police because she understood that she did not have to say anything against her husband.

The clear "adverse inference" and presumably the prosecutor's goal in this line of questioning was to discredit Mrs. Hagen and suggest that she waited to make a statement for improper reasons, possibly as Petitioner suggests to allow the jury to infer that Petitioner and his wife were colluding to hide evidence of Petitioner's guilt. This inference was so obvious that Petitioner's trial counsel discussed it during his closing argument. (Trial Transcript, Vol. IV, pp. 127-128). There does not appear to be any other reasons for this line of questioning except to imply a negative inference on Mrs. Hagen's refusal to give a statement against her husband.

Mrs. Hagen did eventually make a statement and testified at trial. However, in the Fifth Amendment context it is reversible error to permit evidence of a refusal to talk on arrest to be used for the purpose of impeachment even if the defendant testifies at trial.

See *Fowle v. U.S.*, 410 F.2d 48 (9th Cir. 1969) (citing *Grunewald v. U.S.*, 353 U.S. 391 (1957)).

Thus, there does appear to be deficient performance by trial counsel and therefore appellate counsel in failing to raise this issue on appeal. The question then becomes whether Petitioner suffered any prejudice as a result of counsel's failure. Mrs. Hagen's testimony supported her husband's theory of the case because it was consistent with the theory that Mr. Hagen did not know who was coming into his house. Mrs. Hagen testified that Mr. Enger "kind of fell" into the house and Mr. Hagen yanked him into the house by his shirt. She then said that there was a struggle. She testified that she thought her husband yanked Jim into the house because "he thought it was an intruder because of the loud banging." (Trial Transcript, Vol. III, p. 75). She also testified that she did not hear her husband refer to Mr. Enger by name before he shot him.

Finally, Mrs. Hagen's testimony contradicts that of Mr. Cobeen. Mr. Cobeen testified that he saw Mr. Enger and Mrs. Hagen enter the home and that then Mr. Hagen took Mrs. Hagen by the arm and pushed her out onto the porch saying get out. Mrs. Hagen testified that she followed Mr. Enger into the house and then went to the bathroom where she got sick. By discrediting Mrs. Hagen the prosecution was bolstering the testimony of Mr. Cobeen.

However, as with the other errors discussed herein, the prejudice caused by the prosecution's attempt to discredit Mrs. Hagen only applies to the

conviction on aggravated assault. As with Mr. Cobeen, Mrs. Hagen gave no testimony regarding the shooting of Ms. Goodrich. Accordingly, although there was deficient performance, the prejudice only goes to the aggravated assault conviction.

Thus, the state court's finding that the jury would not have "naturally and necessarily" interpreted the prosecutor's comments as comments on Mrs. Hagen's invocation of spousal privilege was an unreasonable determination of the facts in light of the evidence presented with regard to the aggravated assault conviction.

ii. Comments on Witness Credibility

During the testimony of Officer Larry Kirby, the State introduced two videotapes of Petitioner's interviews with the police. Both videos were shown to the jury and the prosecutor asked Officer Kirby to point out inconsistencies between the first and second interview. Petitioner argues that the "gist of Officer Kirby's testimony was that Hagen changed his story between the first and second interviews for the purpose of fabricating a defense."

The Montana Supreme Court determined that "pointing out inconsistencies in a person's statements is not the equivalent of expressing an opinion on credibility." *Hagen III,* 53 P.3d at 895.

Based upon the record in this case, the Court cannot say that this holding is contrary to federal law or objectively unreasonable especially in light of Petitioner's counsel's cross-examination of

Officer Kirby whereby he discredited several of the inconsistencies pointed out by the officer. Counsel's cross examination of this officer dispelled any prejudice which may have potentially arisen by the officer's testimony regarding the perceived inconsistencies in Mr. Hagen's statement.

iii. Vouching Testimony

Petitioner argues that his trial counsel provided ineffective assistance of counsel when he elicited the following testimony from Deputy Jonathan Hansen, a witness for the prosecution:

> Q: While you had encountered them in the bar and some talk about a shooting, did you feel Punky Cobeen was the kind of person, who would keep them out of trouble later in the evening?
>
> A: I have never known him to be violent. I've known him to drink, but I've never known him to be a criminal or violent.

(Trial Transcript Vol. II, p. 133). Petitioner argues that this cross examination bolstered Reece Cobeen's character and credibility. Petitioner contends that no competent defense attorney would have deliberately introduced evidence of a police officer's personal opinion regarding the character of a key prosecution witness. The Montana Supreme Court determined that this testimony did not constitute vouching testimony and was more of an example of character-bolstering evidence. It held that only one incident was

cited and that they could not conclude that based on that isolated instance that Hagen's trial counsel was ineffective or that Mr. Hagen was prejudiced by the remark.

This Court does not find that this decision was contrary to federal law, involved an unreasonable application of federal law, or an unreasonable determination of the facts in light of the evidence presented. Whether or not Mr. Cobeen was violent does not seem relevant to any of the issues at hand and would not have prejudiced Mr. Hagen's defense.

iv. Autopsy Report

Petitioner also faults appellate counsel for failing to raise his claim on direct appeal that trial counsel did not object to the use of the word "homicide" in the autopsy report. The Montana Supreme Court found that it was uncontroverted that Petitioner had killed Alice Goodrich and that killing qualifies as a homicide based on the general definition of the term. Furthermore, trial counsel explained the difference between "homicide" and the legal term of "deliberate homicide" in his closing argument. Under these facts, the Montana Court determined that it was not ineffective to not object to the use of the term or request a limiting instruction and therefore it was not ineffective of appellate counsel to not raise this issue on appeal.

Based upon this record, this Court cannot say that the state court's finding was contrary to federal law, involved an unreasonable application of federal law, or an unreasonable determination of the facts

in light of the evidence presented. It appears that counsel made a choice to discuss the issue in closing rather than object to the term or request a limiting instruction. This court agrees with the state courts that such actions do not constitute deficient performance.

v. Closing

Petitioner contends that during closing arguments, trial counsel erroneously informed the jury that the defense "had to prove that Hagen's motive was self-defense." Petitioner argues that a criminal defendant does not have to "prove" self-defense. Rather, he must only establish sufficient facts to raise a reasonable doubt of his guilt.

The Montana Supreme Court held that under Montana law the state has the burden of proving beyond a reasonable doubt every element of the offense charged, and the defendant if he raises an affirmative defense (such as self-defense) has the burden of producing sufficient evidence on the issue to raise reasonable doubt of his guilt. Therefore, the burden did shift to Petitioner to produce sufficient evidence to raise reasonable doubt of his guilt based on his justifiable use of force defense. The state court found that trial counsel's comments were consistent with that shift of burden. In addition, the jury received an instruction which correctly set forth Petitioner's burden. *Hagen III*, 53 P.3d at 896, ¶ 50.

The United States Supreme Court has specifically upheld a state law that placed on the

defendant the burden of proving self-defense by a preponderance of the evidence. *Martin v. Ohio*, 480 U.S. 228 (1987). Thus, this Court cannot say that the state court's determination was contrary to or involved an unreasonable application of clearly established federal law or was based on an unreasonable determination of the facts in light of the evidence presented.

vi. Mental Health Exams

Petitioner claims that his counsel erred by not informing him that he had a right to a confidential examination at the State's expense, as set forth by *Ake v. Oklahoma*, 470 U.S. 68 (1985) and *Estelle v. Smith*, 451 U.S. 454 (1981) and failed to inform him prior to his participation in the mental health examination that the results of the evaluations could be used against him at sentencing. Petitioner claims this was error for several reasons. First, he contends that the Montana Supreme Court utilized the wrong standard when it stated that, "As the defendant, Hagen carries the burden of showing that but for appellate counsel's performance, the result of the proceeding would have been different." *Hagen III*, 53 P.3d at 894. *Strickland* only requires that a defendant demonstrate a "reasonable probability" that the outcome would have been different had counsel been effective.

Secondly, Petitioner contends that Montana court erred in its final conclusion that "Hagen has not identified what information in the doctor's evaluations was damaging to his defense." *Hagen III*, 53 P.3d at 894. Petitioner counters that the results of the psychiatric examinations are of record and that the

trial court specifically stated that he had considered those reports in imposing the sentence. Petitioner argues that the contents of the reports provided "highly damaging information about Hagen to the prosecution and the court." Specifically, Petitioner points to the reports of persistent alcohol abuse, undocumented violent altercations involving Hagen, reports of being untrustworthy, resistant to prescriptive medication for his diagnosed manic-depressive disorder and his tendency to behave in highly threatening and violent ways, including discharging firearms, when he was intoxicated.

Respondent argues that the claim is conclusory and does not state a valid constitutional claim. (Dkt. # 8, p. 48).

Although the Montana Supreme Court cited the incorrect standard in its discussion of this issue, it set forth the correct standard in two previous sections in its opinion. First, it initially discussed *Strickland* with regard to the effectiveness of trial counsel and cited the appropriate standard being whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Hagen III*, 53 P.3d at 890, ¶ 18 (citing *Strickland*, 466 U.S. at 694). Secondly, the Montana Supreme Court again stated the proper standard when discussing the standard to analyze claims of ineffective assistance of appellate counsel. *Hagen III*, 53 P.3d at 893, ¶ 37.

In *Woodford v. Visciotti*, 537 U.S. 19 (2002), the United States Supreme Court reversed the Ninth

Circuit for overturning the California Supreme Court for using the term "probable" without the modifier "reasonably" in four places in its opinion despite the fact that it had correctly set forth the *Strickland* criterion in several other places in its opinion. The Supreme Court held that the California Supreme Court's

> occasional shorthand reference to that standard by use of the term "probable" without the modifier may perhaps be imprecise, but if so it can no more be considered a repudiation of the standard than can this Court's own occasional indulgence in the same imprecision.

Id. at 24-25.

This Court finds that the Montana Supreme Court's shorthand citation to *Strickland*, although imprecise, is not sufficient justification to overcome §2254(d)'s "highly deferential standard for evaluating state-court rulings." *Woodford*, 537 U.S. at 24 (citing *Lindh v. Murphy*, 521 U.S. 320, 333, n.7 (1997)).

The trial court found that the availability of the pre-trial psychological examinations to the prosecution and the Court was deficient performance but that "no prejudice resulted in the defense." The Montana Supreme Court similarly found that they could not conclude that the information in the doctors' evaluations was damaging to his defense or that his sentence was somehow lengthened based solely on the doctors' evaluation.

This Court does not find that this decision was contrary to federal law, involved an unreasonable application of federal law, or an unreasonable determination of the facts in light of the evidence presented.

VII. CERTIFICATE OF APPEALABILITY

Petitioner cannot appeal the dismissal of a federal habeas petition unless the Court[7] issues a certificate of appealability (COA) as required by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). 28 U.S.C. § 2253. The COA requirements would apply in this case if Petitioner sought to appeal the denial of his habeas corpus petition since any such appeal would occur after the April 24, 1996 effective date of the AEDPA. *Slack v. McDaniel*, 529 U.S. 473, 478 (2000); *Lambright v. Stewart*, 220 F.3d 1022, 1024 (9th Cir. 2000).

Pursuant to 28 U.S.C. § 2253(c), as amended by the AEDPA, "[a] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." *See Hohn v. United States*, 524 U.S. 236, 240 (1998); *Lambright*, 220 F.3d at 1024. The "substantial showing" standard can be satisfied on an issue-by-issue basis. *Lambright*, 220 F.3d at 1024 (citing 28 U.S.C. § 2253(c)(3)).

The United States Supreme Court has defined the standard of issuance for a COA as follows:

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[7]The district court judge may issue the certificate. *U.S. v. Asrar*, 116 F.3d 1268, 1269-70 (9th Cir. 1997).

> To obtain a COA under §§ 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot*, includes showing that reasonable jurists could debate whether (or, for that matter agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'

Slack, 529 U.S. at 483-484 (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)).

"The court must resolve doubts about the propriety of a COA in the petitioner's favor." *Jennings v. Woodford*, 290 F.3d 1006 (9th Cir. 2002) (citing *Lambright*, 220 F.3d at 1025 (9th Cir. 2000)). In addition, Petitioner is not required to establish that he will prevail on the merits. *Lambright*, 220 F.3d at 1025 (citing *Barefoot*, 463 U.S. at 893 n.4). Rather, the COA requirement seeks only to prevent frivolous appeals from wasting judicial resources, while still affording petitioners an opportunity to show potential for merit. *Lambright*, 220 F.3d at 1025.

The COA must indicate which issues satisfy the required showing. 28 U.S.C. § 2253(c)(3). Additionally, the district judge must "state why a certificate should not issue." Fed. R. App. P. 22(b)(1).

The Court concedes that this is a difficult case as to many of the issues raised by Petitioner and that reasonable jurists could debate whether the petition should have been resolved in a different manner with

regard to at least the following issues:

1. Claim 2--Whether the district court's findings and conclusions were inconsistent?

2. Claims 3Ai (petition) and C4 (brief): Failure to present evidence about Jim Enger

3. Claims 3Aii, 3Aiv, 3B regarding the Testimony of Reece Cobeen

4. Claim 3I: Instruction on Negligent Homicide

5. Claim 3D: Spousal privilege

6. Claim 3K: Mental Health Exam

VIII. CONCLUSION

In sum, the Court finds that the Montana Supreme Court decision was contrary to and/or involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. (See claims 2 (inconsistent findings and conclusions); 3Ai (Enger's credibility); 3Aii, 3Aiv, 3B and 4iii (Cobeen's credibility); 4i (spousal privilege); and 4vi (admission of mental health evaluations). These errors are of sufficient consequence to have undermined the confidence in the jury's verdict in Petitioner's conviction for aggravated assault but not in his conviction for deliberate homicide.

Based on the foregoing, the Court enters the following:

RECOMMENDATION

1. The petition for writ of habeas corpus should be **GRANTED** as to Petitioner's conviction for aggravated assault. Respondent should be directed to return Mr. Hagen to the custody of the state district court for retrial on the aggravated assault charge or other proceedings consistent with the Court's Order.

2. The petition for writ of habeas corpus should be **DENIED** as to Petitioner's conviction for deliberate homicide.

3. That the Court grant a Certificate of Appealability at least as to following six issues:

a. Claim 2--Whether the district court's findings and conclusions were inconsistent?

b. Claims 3Ai (petition) and C4 (brief): Failure to present evidence about Jim Enger

c. Claims 3Aii, 3Aiv, 3B regarding the Testimony of Reece Cobeen

d. Claim 3I: Instruction on Negligent Homicide

e. Claim 3D: Spousal privilege

f. Claim 3K: Mental Health Exam

NOTICE OF RIGHT TO OBJECT TO FINDINGS & RECOMMENDATION AND CONSEQUENCES OF FAILURE TO OBJECT

The Clerk of Court shall serve a copy of these Findings and Recommendation on the parties. The parties are advised that, pursuant to 28 U.S.C. § 636(b)(1), they have the right to file written objections to this

Findings and Recommendation. Any objections to the Findings and Recommendation must be filed with the Clerk of Court within ten (10) days after receipt hereof, or objection is waived.

DATED this 1st day of September, 2004.

Leif B. Erickson
United States Magistrate Judge

APPENDIX F

Honorable Leif B. Erickson
Federal Magistrate Judge
Missoula Division
Russell E. Smith Courthouse
201 East Broadway, Room 370
Missoula, MT 59802

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

BRUCE HOLTE HAGEN,
Petitioner,

vs.

JAMES MACDONALD,
Warden, Crossroads
Correctional Center,
MIKE MCGRATH,
Montana Attorney
General,
Respondents.

Cause No. CV 02-147-M-LBE

ORDER

On September 1, 2004, the undersigned issued a Findings and Recommendation granting in part and denying in part Mr. Hagen's Petition for Writ of Habeas Corpus. While the findings of the Court remain the same, the Recommendation was improvidently

issued as the undersigned has the consent of the parties. Accordingly, it is hereby **ORDERED** that the Recommendation issued September 1, 2001 is withdrawn and in its place and stead I issue the following Order:

1. Bruce Hagen's petition for writ of habeas corpus is **GRANTED** as to his conviction for aggravated assault. Respondent is directed to return Mr. Hagen to the custody of the state district court for retrial on the aggravated assault charge or other proceedings consistent with the Court's Order.

2. Bruce Hagen's petition for writ of habeas corpus is **DENIED** as to his conviction for deliberate homicide.

3. Mr. Hagen is granted a Certificate of Appealability with regard to the following six issues:

a. Claim 2--Whether the district court's findings and conclusions were inconsistent?

b. Claims 3Ai (petition) and C4 (brief): Failure to present evidence about Jim Enger

c. Claims 3Aii, 3Aiv, 3B regarding the Testimony of Reece Cobeen

d. Claim 3I: Instruction on Negligent Homicide

e. Claim 3D: Spousal privilege

f. Claim 3K: Mental Health Exam

Should either party want a Certificate of Appealability on any other issue they should file a motion requesting such.

4. The Clerk is directed to enter judgment as set forth above.

DATED this 7th day of September, 2004.

Leif B. Erickson
United States Magistrate Judge